ADVISORY COMMITTEE ON JUDICIAL CONDUCT
OF THE
DISTRICT OF COLUMBIA COURTS

ADVISORY OPINION No. 2

(April 23, 1992)

DISQUALIFICATI0N OF JUDGE BECAUSE OF PAST EMPLOYMENT BY LAW ENFORCEMENT AGENCIES AND SPOUSE'S PRESENT AFFILIATI0N WITH MFTR0POLITAN POLICE DEPARTMENT

A judge of the Superior Court has requested a formal advisory opinion addressing disqualification issues which have been raised, and which she expects to be raised in the future, as a result of her past and present association with government agencies, specifically the Metropolitan Police Department (MPD) and the Office of the United States Attorney. In particular, before being appointed to the Superior Court of the District of Columbia, the judge served as a police officer with the MPD for six and a half years, achieving the rank of sergeant; she then served as an Assistant United States Attorney for the District of Columbia for sixteen years, for much of that time prosecuting criminal cases. Her husband is presently a Deputy Chief of Police with the MPD. A salaried employee, he has been the Commanding Officer of the First District, one of seven patrol districts in the city, since February 1988. His responsibilities, as described in documents submitted to us, are

set forth in the margin.[1] We are told that, although his duties include disciplining personnel and monitoring crime trends in the First District, he rarely becomes involved personally in, or acquires knowledge of, individual cases. He has not testified regularly in court for more than fifteen years.[2]

The judge has posed a series of questions which focused on her assignment at the time to juvenile delinquency cases in the Family Division and likely future assignments involving criminal cases in particular. These questions can be summarized as follows:

---

[1] As set forth in the police General Order which the judge has furnished us, the duties and responsibilities of a Deputy Chief of Police consist of the following:

> a. Perform such duties as may be assigned by the Chief of Police, and establish and maintain such records of a police nature as may be directed by the Mayor or Chief of Police.
>
> b. Assure that the laws and regulations governing the department are properly observed and enforced and that discipline is maintained.
>
> c. Advise the Chief of Police concerning all matters of importance and apprise him of conditions in the organizational elements under their command.
>
> d. Review and forward to the Chief of Police all special reports and requests submitted by the organizational elements under their command.
>
> e. Be responsible for complying with the provisions of departmental directives relative to their position.

[2] Our opinion is predicated upon these representations as to the spouse's position and responsibilities. We necessarily offer no opinion about ethical

1. Because of her own prior experience as a police officer and a criminal prosecutor, should the judge recuse herself from any case in which the conduct or credibility of law enforcement officers may be an issue? More particularly, should the judge disqualify herself from any case involving a charge of assault on a police officer?

2. Because of her spousal relationship, should the judge recuse herself from any case

a. in which an MPD officer is expected to be a witness;

b. in which an officer assigned to the First District is expected to be a witness; or

c. which involves a criminal charge of assault on a police officer?

In each such case involving a police officer as potential witness or victim, the judge has in mind situations where neither she nor any family member is acquainted personally with the officer. Where such acquaintanceship exists, the judge apparently intends to recuse herself automatically.[3]

We first set forth the general ethical principles that govern our inquiry. They are contained, in the first instance,

---

issues that might arise were his duties and relationships to officers under his command different than as described to us.

[3] We accordingly express no opinion whether recusal in such circumstances would be ethically required.

in the ABA Code of Judicial Conduct (1972, as amended in 1982 and 1984) (hereafter 1972 Code). However, because this Committee currently has under consideration whether to recommend adoption, in whole or in part, of the ABA Model Code of Judicial Conduct (1990) (hereafter 1990 Code), we shall also set forth the standards contained in that Code.

A.

Canon 2 of the 1972 Code provides that "[a] judge should avoid impropriety and the appearance of impropriety in all his activities."[4] The equal emphasis in this language upon "the appearance of impropriety" demonstrates that the standard of conduct is an objective one: Would a reasonable person knowing all the circumstances question the judge's impartiality? *E.g.,* L. Abramson, *Judicial Disqualification under Canon 3C of the Code of Judicial Conduct* 16 (1986) (quoting E. Thode, *Reporter's Notes of Code of Judicial Conduct* 60 (1973)); *Liljeberg v. Health Services Acquisition Corp.,* 486 U.S. 847, 860-61 (1988); *id.* at 871, 872 (Rehnquist, C.J., dissenting); *Scott v. United States,* 559 A.2d 745, 749 (D.C. 1989).[5]

---

[4] The 1990 Code makes all pronoun references gender-neutral.

[5] Our court of appeals has had several occasions recently to apply the standard of "the appearance of impropriety" to conduct of individual judges. *In re J.A.,* No. 89-1352 (D.C. December 20, 1991); *Belton v. United States,* 581 A.2d 1205 (D.C. 1990); *Scott v. United States, supra; Turman v. United States,* 555 A.2d 1037 (D.C. 1989) (per curiam). The court has consistently applied an "objective" test for evaluating appearances by emphasizing that the inquiry is how "'the average person,' a fully informed person," or an "objective observer" would view the situation. *Scott,* 559 A.2d at 750, 754; *Belton,* 581 A.2d at 1214 ("a hypothetical

More particularly, 1972 Canon 2B provides that "[a] judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment." Canon 3 provides broadly that "[a] judge should perform the duties of his office impartially and diligently," then sets forth (in section C, "Disqualification") specific instances in which "[a] judge should disqualify himself" because "his impartiality might reasonably be questioned." As relevant to our present inquiry, Canon 3C provides:

> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
>
> > (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
> >
> > * * * *
> >
> > (c) he knows that he ... or his spouse... as a financial interest in the subject matter in controversy or in a party to the

---

objective observer"). Hence, although individual litigants -- including criminal defendants -- who appear before the judge are certainly among the class of those who perceptions provide the benchmark for judging appearances, there is no basis for creation of a sub-class of reasonable person or objective observer defined -- for example -- as "objective" defendants in criminal cases. The "hypothetical objective observer" standard necessarily means that we factor out those subjective perceptions particular to parties before the judge about the fairness of the proceedings and partiality of the tribunal.

proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) he or his spouse

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

* * * *

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding....[6]

---

[6] Canon 3E of the 1990 Code similarly provides that:

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

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

* * * *

(c) the judge knows that he or she ...or the judge's spouse ... 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...

(i) is a party to the proceeding, or an officer, director or trustee of a party;

B.

We begin by observing that if the judge, as a result either of her own previous employment or of her husband's employment, has personal knowledge of disputed evidentiary facts concerning a proceeding to which she is assigned, she must disqualify herself. 1972 Canon 3C (1) (a). By its owns terms, this requirement does not extend to personal knowledge which the judge's *spouse*, by virtue of his office, has acquired but which he has not conveyed to the judge; in that instance, the judge could have no basis on which to know whether recusal was required or not required under this canon. The question may be asked, however, whether the judge is obliged to inquire of her spouse whether he has personal knowledge of disputed evidentiary facts concerning a proceeding assigned to her. We think the answer to this question is no, for two reasons. First, the judge has explained to us that her spouse, because of the level of his

---

* * * *

> (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.

This advisory opinion does not require us to express any view as to differences in meaning between an "interest" (1972 Code) and a "de minimis interest" (1990 Code) in the subject in controversy.

supervisory position, rarely becomes involved in individual cases or acquires personal knowledge of them. In the vast majority of cases, therefore, a duty on the judge's part to inquire whether he possesses such knowledge would likely yield nothing. Second, we think a reasonable person, knowing the spouse's position as a senior police official, would assume that the spouse would exercise great circumspection in discussing with the judge his knowledge of cases that possibly might come before her, precisely to avoid disqualifications burdensome to the court. In sum, we do not believe that a reasonable person, knowing all the circumstances, would impute to the judge personally any knowledge that her spouse might have of facts concerning a proceeding assigned to her. Therefore, she is under no obligation routinely to inquire of her husband whether he has such knowledge.

C.

We inquire next whether the judge's spouse should be regarded as "an officer" of a "party" in any case in which the District of Columbia is a party to the proceeding, hence requiring her disqualification under 1972 Canon 3C (1) (d) (i). This issue may arise in regard to Family Division petitions *(e.g.*, juvenile petitions alleging delinquency) and certain criminal prosecutions brought by the District of Columbia, as well as in civil proceedings in which the District of Columbia is a party. Canon 3C (1) (d) (i) equates a party with "an officer, director

or trustee of a party." From this language, it might be thought that the drafters had in mind an "officer" of a private or commercial entity, but there is authority that officials of governmental agencies are "officers" within the meaning of this canon. *E.g., Ethics Opinion of the Committee of the Kentucky Judiciary* JE- 80; *Ethics Opinion of the Ethics Advisory Committee of the State of Washington,* 8401; *see Cuyahoga County Board of Mental Retardation v. Association of Cuyahoga County Teachers of the Trainable Retarded,* 351 N.E.2d 777 (Ohio App. 1975). We shall assume this is so.

Nevertheless, we do not believe that this canon, by itself, requires the judge's disqualification in any case in which the District of Columbia is a party. The judge's spouse is a salaried Deputy Chief of the Metropolitan Police Department; as such he is an "officer" of the police department, although a high-level officer whose responsibilities involve departmental policy-making. The MPD itself is not a "party" in proceedings in the Superior Court; it is a department of the District of Columbia government. In our view, the link between the office and responsibilities of the judge's spouse and the District's role as party in a proceeding is not close enough to deem him an officer of a party within the meaning of the canon.[7] We believe,

[7] See, by contrast, *Ethical Opinion of the Alabama Judicial lnquiry Commission 88-342* (Canon 3C (1)(d)(i) requires disqualification of judge from any proceeding in which city is party either as prosecutor or party to civil case, where judge's brother-in-law is member of city council, "the governing body of the city").

instead, that more discriminating answers to whether the judge's impartiality might reasonably be questioned can be furnished by inquiring -- under 1972 Canons 3C (1) (c) and (d) (iii) -- whether the judge knows her spouse "to have an interest that could be substantially affected by the outcome of the proceeding."[8] We turn therefore to that inquiry.

D.

Applying the standard of "an interest that could be substantially affected" to the questions posed by the judge, we conclude that the judge is under no categorical obligation to disqualify herself from a case in which MPD officers testify. From the fact alone that police officers testify in a proceeding we do not think that, as a general rule, a reasonable person would impute to the judge's spouse an interest that could be substantially affected by the outcome of the proceeding. It is of course true, as Justice Jackson remarked many years ago, that police officers are "engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States,* 333 U.S. 10, 14 (1948). Hence it may be assumed that the judge's spouse, as a high-level police official, has an interest in the successful outcome *(i.e.,* a trial leading to conviction) of criminal prosecutions in which guilt is sought to be established by the

---

[8] The 1990 Code states that "knowledge" or "knows" denotes "actual knowledge of the fact in question," but that "[a] person's knowledge may be inferred from circumstances."

testimony of police officers. He may also be assumed to have an institutional interest in having subordinate police officers be found credible by the trier of fact in criminal cases. But, as a general rule, we do not think a reasonable person would regard this interest as "substantially affected" by the outcome of particular criminal or juvenile proceedings before the judge.

Certainly the spouse, as a salaried governmental official, has no financial interest that would be substantially affected by the outcome of such proceedings. Nor do we believe it can reasonably be asserted that his career advancement would be substantially affected by the outcome of the limited number of proceedings involving police testimony over which the judge may be expected to preside. As indicated, we are told that the spouse's duties include monitoring crime trends and disciplining personnel under his command; his job description, note 1, *supra,* includes "[a]dvis[ing] the Chief of Police concerning all matters of importance and appris[ing] him of conditions in the organizational elements under [the spouse's] command." As a general matter, it is altogether improbable, in our view, that the spouse's performance of these duties would be substantially affected by the outcome of proceedings, individually or in the aggregate, over which the judge may be expected to preside.

We reach a different conclusion as to the question whether the judge should recuse herself when officers testifying in the

proceeding are assigned to the First District, commanded by the judge's spouse. We are told by the judge that approximately 500 officers are assigned to the First District. Although that is a large organization, we believe a reasonable, objective observer would perceive the relationship between the commander of a division and his officers to be necessarily closer and more personal than his relation to other MPD officers. That is true even though we are told the spouse rarely becomes personally involved in or familiar with individual cases in the District. The very notion of a "commander" would suggest to a reasonable person that the spouse has an interest in the courtroom testimony of the persons he commands -- *i.e.*, ratification of that testimony in the broad run of cases by the trier of fact -- that might be substantially affected by the outcome of proceedings before the judge in which those officers testify.[9] We therefore are of the view that the judge should disqualify herself from

---

[9] In saying this, we do not imply in the least that we believe either the judge or her spouse would harbor actual bias in favor of a given result in such cases. The personal knowledge of the character of the judge and her spouse by members of this committee compels precisely the opposite conclusion. We are concerned here, however, with what a hypothetical reasonable person would perceive. Although that person is assumed to have knowledge of all the surrounding circumstance, page 4, *supra,* we could not reasonably extend that concept to include personal knowledge of the judge and her spouse such as committee members possess and which causes us to reject the possibility of actual bias.

any proceeding before her in which a First District officer is scheduled to testify.

E.

The judge further asks whether the answer to the recusal question should be different when the proceeding involves a police officer not merely as a witness, but as a victim or actor in the events at issue in the proceeding. The former instance would include cases involving a charge of assaulting a police officer, about which the judge has specifically asked our opinion. The second would include cases (presumably far more numerous) in which an issue in the proceeding is whether, for example, police officers violated the Fourth or Fifth Amendments in conducting a search and seizure or obtaining a confession from an accused. We believe the distinction previously made controls here as well. The judge should recuse herself in any case in which the conduct of a First District officer is in issue -- in the sense described of either victim or actor. But as to MPD officers generally, the judge is under no general obligation to disqualify herself. In those cases, for reasons already discussed, we do not believe a reasonable person would perceive that the judge's spouse has an interest that would be substantially affected by the outcome of such proceedings conducted before the judge. As explained earlier, of course, in any such case where the judge or her spouse is personally

acquainted with the officer(s) involved, the judge intends to recuse herself. See page 3, *supra.* And whenever the judge has personal knowledge of disputed facts concerning, for example, a particular assault on a police officer, Canon 3C (1) (a) will require her disqualification. See page 7, *supra.* But in our view, the fact alone that conduct involving an MPD officer other than a First District officer as victim or actor is at issue in the proceeding does not justify a conclusion that the judge's spouse has an interest that would be substantially affected by the proceeding.

Nevertheless, there may be circumstances where this general rule would not apply even as to MPD officers generally. If, for example, a criminal proceeding called into question a policy or practice formulated and adopted at the Department or Police District level, then a reasonable person might well conclude that the judge's spouse had an interest that might be affected by resolution of that challenge. Examples (meant to be strictly hypothetical) might be disputes over a general police policy concerning the conduct of "roadblock" stops of motor vehicles for license and registration inspection, or a standard police procedure for video tape-recording (or not recording) statements by criminal suspects in response to police interrogation. When policies and practices such as these are placed directly at issue in proceedings, the judge's relation to a senior police official would require that she seriously consider disqualifying

herself to avoid the appearance of partiality. For similar reasons, the judge may be required to disqualify herself from any civil action against the District of Columbia when the conduct involved is that of police officers and the litigation may concern issues of police training and supervision.[10]

F.

Finally, we address the question of what duties of disqualification the judge may have by virtue of her own past employment as a police officer and an Assistant United States Attorney. We have already noted that if the judge, by virtue of her past employment, has personal knowledge of disputed evidentiary facts concerning a proceeding assigned to her, she must disqualify herself. 1972 Canon 3C (1) (a). Beyond this, there can be no general assumption that the judge "has a personal bias or prejudice concerning a party," *id.*, merely because she was formerly a police officer and a prosecutor. "Mere allegations based on a judge's background are insufficient to suggest partiality toward the parties before [her]." *Gregory v. United States,* 393 A.2d 132, 143 (D.C. 1978). For this reason, we are satisfied that the judge's past employment as a police officer no more commands her general disqualification from cases in which police appear as witnesses (or are involved as actors or

---

[10] We have no occasion to address here, but merely advert to, the provisions for remittal of disqualification contained in both the 1972 Code and the 1990 Code. *See* 1972 Code, Canon 3D; 1990 Code, Canon 3F. Furthermore, although we do not discuss such situations here, we acknowledge that extraordinary circumstances may arise where the condition calling for the judge's disqualification is not foreseeable and countervailing considerations -- such as avoiding the mistrial of a criminal trial in progress -- may dictate that the judge should not recuse herself.

victims) than does her spouse's present affiliation with the police department. Regarding the judge's recent employment as a prosecuting attorney, 1972 Canon 3C (1)(b) generally requires a judge to disqualify himself from a matter if "he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter...." However, the commentary to this canon states:

> A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection; a judge formerly employed by a governmental agency, however, should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association.

Thus, even as to matters that were pending before the Office of the United states Attorney while the judge was employed there, she must recuse herself only (1) if she served as a lawyer in the matter in controversy, or (2) --broadly -- if her impartiality might reasonably be questioned because of her former association with a lawyer who served as a lawyer concerning the matter.[11]

---

[11] We note that a number of judges who were formerly prosecutors have found it appropriate not to preside over cases pending in the prosecutor's office while they were employed there. The committee does not mean to disapprove of this practice.