ADVISORY COMMITTEE ON JUDICIAL CONDUCT
OF THE
DISTRICT OF COLUMBIA COURTS

ADVISORY OPINION No. 6
(September 15, 1995)

WHETHER A JUDGE OF THE SUPERIOR COURT MUST DISQUALIFY HIMSELF FROM PRESIDING OVER CRIMINAL MATTERS PROSECUTED BY THE OFFICE OF THE UNITED STATES ATTORNEY FOR THE DISTRICT OF COLUMBIA BECAUSE THE SPOUSE OF THE JUDGE IS AN ASSISTANT UNITED STATES ATTORNEY ASSIGNED TO THE SUPERIOR COURT

A judge of the Superior Court has requested an advisory opinion concerning whether he must recuse himself from presiding over criminal matters prosecuted by the Office of the United States Attorney because his spouse was recently hired as an Assistant United States Attorney for the District of Columbia. At the time of the judge's request, the spouse was expected to join the office shortly. We understand that she has since begun work as an Assistant United States Attorney, and that her duties will inevitably include the trial of cases in the Superior Court. The judge intends to disqualify himself from any criminal case in which, so far as can be ascertained, his spouse has participated at any stage. We assume further, since Assistant United States Attorneys commonly are assigned to the calendar of a judge as part of two-or-more-member "teams," that the spouse will not be assigned to the

judge's "team" and that, accordingly, no issue of disqualification arising from this immediate association between the spouse and another attorney who appears before the judge will arise. With these exceptions, the judge's inquiry relates to his obligation *vel non* to recuse himself from the entire body of criminal cases prosecuted by the United States in Superior Court.

In our opinion, the judge is under no general obligation to disqualify himself from participation in these cases. Of course, the circumstances of individual cases may dictate otherwise: for example, the judge's spouse, although having had no involvement in a case immediately before the judge, may have taken part in a related prosecution. In such cases, the judge's obligation to avoid even the appearance of partiality may impose on him the duty to recuse. But, in general, we apprehend no reason for imputing to the judge, even as a matter of appearance, the status of advocate or partisan which his spouse occupies by virtue of her position as Assistant United states Attorney.[1]

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[1] The spouse's position may fairly be termed partisan despite our recognition that "[t]he United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution

The standards governing this inquiry are contained in the Code of Judicial Conduct (1995), adopted by the Joint Committee on Judicial Administration of the District of Columbia Courts effective June 1, 1995.[2] Canon 3 B. (1) of the Code provides that "[a] judge *shall* hear and decide matters assigned to the judge except those in which disqualification is required" (emphasis added). Canon 3 E. in turn governs disqualification. It provides, in Canon 3 E. (1), that "[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" which it then proceeds to illustrate. Interpreting predecessor language of the 1972 Code, this Committee concluded "that the standard of conduct is an objective one: Would a reasonable person knowing all the circumstances question the judge's impartiality?"[3] Indeed, as is true of the 1972 Code, the presence of the adverb

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is not that it shall win a case, but that justice shall be done." *Berger v. United States,* 295 U.S. 78, 88 (1935).

[2] The judge in question began his assignment to criminal cases before June 1, 1995, at a time when judges in this jurisdiction were subject to the ABA Code of Judicial Conduct (1972, as amended in this jurisdiction in 1982 and 1984). However, we have found no differences between the respective Codes affecting the issue before us, and hence are comfortable in taking as our text the 1995 Code.

[3] Advisory Opinion No. 2 ("Disqualification of Judge Because of Past Employment by Law Enforcement Agencies and Spouse's Present Affiliation with Metropolitan Police Department"), 120 Daily Wash. L. Rptr. 1745, 1749 (August 17, 1992).

"reasonably" in Canon 3 E. (1) permits no other conclusion than that the standard is objective, requiring us to "factor out," for example, "those subjective perceptions particular to parties before the judge about the fairness of the proceedings and partiality of the tribunal."[4]

We begin by inquiring, as we did in Advisory Opinion No. 2, *supra* note 3, whether the judge's spouse should be regarded as an officer ... of a party" for purposes of Canon 3 E. (1)(d)(i), which requires the judge to disqualify himself or herself whenever the judge's spouse (among other persons) "is a party to the proceeding, or an officer, director or trustee of a party." The Code does not define "officer," but we have little difficulty in concluding that, as applied to this ground for disqualification, the term does not include a non-supervisory Assistant United States Attorney such as the judge's spouse in this case, who exercises no command or supervisory responsibility in relation to the prosecutor(s) assigned to the proceeding before the judge. The simple coupling of "officer" with "director" and "trustee"

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[4] Advisory Opinion No. 2, 120 Daily Wash. L. Rptr. at 1749 n.5. *See also* Advisory Opinion No. 5 ("Whether Disqualification of Judge From Criminal Matters Prosecuted by the Office of the United states Attorney is Necessary Because of Judge's Past Employment with the Department of Justice") (January 27, 1995).

connotes to us a level of responsibility beyond the duties of an ordinary line Assistant United States Attorney.

We turn, therefore, to Canon 3 E. (1)(c) & (d)(iii), and inquire whether the judge reasonably may be said to know that his spouse has "any ... more than de minimis interest that could be substantially affected" by the outcome of criminal cases tried before him, even though she has not participated in them at any stage. In Advisory Opinion No. 2, we posed this question with regard to the spouse of a judge who was a senior supervisory member of the Metropolitan Police Department. We first took almost as a given that "the spouse, as a salaried governmental official, has no financial interest that would be substantially affected by the outcome of such proceedings." That the same holds true of a salaried Assistant United States Attorney is evident and requires no further discussion. In the case of the senior police official, we next had to consider whether his institutional affiliation and identity constituted a significant (not de minimis) interest that could be affected by the outcome of particular criminal proceedings before the judge. The inquiry yielded different answers depending, for example, on whether a proceeding might include testimony by police

officers assigned to the particular police district commanded by the spouse, or raise a question of police policy or practice of the sort the spouse as a senior official could have had a hand in formulating or administering on a department- or district-wide basis.

None of these considerations, however, all derived from the police official's status as a supervisor or command-level employee, concerns us in the present matter. The judge's spouse, one of approximately 293 attorneys currently employed by the United States Attorney's Office and approximately 151 assigned to the Superior Court,[5] cannot reasonably be said to have more than what may be termed a solidarity or loyalty interest in the results of particular cases tried before the judge. As a member of the collective body *of* Assistants, it may enhance her pride and sense of group accomplishment to know that particular cases have been "won," but this interest is surely de minimis and, moreover, would not be substantially affected by the verdicts in trials (individual or collective) conducted before this single Superior Court judge. As one court has stated in considering a similar issue, “[T]he prestige *of* the [prosecutor's] office as a whole is not greatly

[5] We assume, for purposes of this opinion, that the spouse ***is*** currently assigned to the Superior Court.

affected by the outcome *of* a particular case," *Smith v. Beckman,* 683 P.2d 1214, 1216 (Col. App. 1984), nor even by a "string" of successes before a particular judge. Group solidarity as applied to the entire contingent of Superior Court prosecutors, is too slender an interest on which to require disqualification of the judge because of his spouse's employment.

There remains for us to consider, nevertheless, whether the broad "appearance *of* impropriety" standard, Canon 2,[6] demands disqualification of a judge whose spouse -- his partner "in a relationship more intimate than any other kind of relationship between individuals," *Smith, supra* -- is affiliated with an institution which appears regularly in the role of advocate before the judge. Canon 2 does not require us to accept the notion that spouses today are unable to separate the identity and intimacy they share as marital partners from the independence they exercise as professionals in their employment. We say this not out of any obeisance to prevailing "correctness," but in commonplace recognition that women today pursue careers and that success and esteem in professional life -- certainly in the legal profession, certainly in this city,

[6] "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities."

and certainly far more than heretofore -- are gained by individual, independent achievement. It is true, of course, that married persons "share confidences regarding their personal lives and employment situations," *id.*,[7] but if that means -- in this case -- no more than that the judge and his spouse discuss together the day-to-day workings of the U.S. Attorney's Office, then it is too frail a consideration on which to compel recusal. If, on the other hand, the shared "confidences" were to extend to individual cases, then Canon 3 could well demand disqualification in any event because of the judge's "personal knowledge of disputed evidentiary facts concerning the proceeding." Canon 3 E. (1)(a). Beyond this, we are content to rely on the good judgment of the spouse and the judge. As we stated in Advisory Opinion No. 2 (here paraphrasing slightly), "[W]e think a reasonable person, knowing the spouse's position as [an Assistant United States Attorney], would assume that the spouse would exercise great circumspection in discussing with the judge [her] knowledge of cases that might possibly come before [him], precisely

[7] This was a primary reason why a Colorado court of appeals in *Smith* determined that "the existence of a marriage relationship between a judge and a deputy district attorney in the same county is sufficient to establish grounds for disqualification ...." 683 P.2d at 1216. As we know nothing about the size of the county, the court, or the district attorney's office in *Smith,* we are reluctant to criticize the *Smith* opinion.

to avoid disqualifications burdensome to the court." 120 Daily Wash. L. Rptr. at 1750.

Subject to the exceptions stated herein, therefore, we conclude that the judge is not required to disqualify himself in the circumstances presented to us for opinion. It follows that, in these cases, the judge is under no obligation to disclose to the parties the fact that his wife is an Assistant United States Attorney. *Cf.* Canon 3 F (where judge is *disqualified* by the terms of Canon 3 E, the judge "may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider ... whether to waive disqualification").