ADVISORY COMMITTEE ON JUDICIAL CONDUCT

OF THE

DISTRICT OF COLUMBIA COURTS

ADVISORY OPINION No. 9
(May 3, 2001)

DISQUALIFICATION OF JUDGE BECAUSE OF
SPOUSE'S POSITION AS CORPORATION COUNSEL

A judge of the Superior Court has requested a formal advisory opinion addressing possible disqualification issues arising from the status of her spouse as Corporation Counsel, that is, the chief legal officer of the District of Columbia. In that capacity, he shall "have charge and conduct of [sic] all law business of the said District, and all suits instituted by and against the government thereof." D.C. Code § 1-361. While day-to-day activities of the office are carried out by a large staff of Assistant Corporation Counsels, these attorneys operate "under the direction and control of the Corporation Counsel" and perform such duties as may be "assigned to them by the said Corporation Counsel." § 1-362.

I.

We have previously had occasion to consider at some length the ethical issues presented when a judge of the

Superior Court has a spouse who occupies a high supervisory position in the District of Columbia. In Advisory Opinion No. 2, that spouse was a Deputy Chief of Police with the Metropolitan Police Department and Commanding Officer of the First District, one of seven patrol districts in the city. We identified there the portions of the Code of Judicial Conduct that might be of particular relevance in such a situation, including the following provisions of Canon 3E:[1]

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might

[1] At the time of Advisory Opinion No. 2, our judges were governed by the ABA Code of Judicial Conduct, as amended. In 1995, the Joint Committee on Judicial Administration adopted the presently controlling Code of Judicial Conduct. The Advisory Opinion noted that insofar as relevant here, both Codes were substantially similar, with the exception that the old Code referred to simply an "interest" while the new Code referred to a "de minimis interest." In the circumstances of the present inquiry we do not think we need address this particular difference.

reasonably be questioned, including but not limited to instances where:

* * *

(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;

(ii) is acting as a lawyer in the proceeding;[2]

(iii) is known by the judge to have a more than de minimis interest

[2] We did not include this subsection in addressing disqualification where the spouse was a Deputy Chief of Police but it is obviously relevant in the present case.

that could be substantially affected by the proceeding.

We will not repeat here the background analysis that we gave with respect to these provisions and their application in Advisory Opinion No. 2,[3] but instead focus on the status of Corporation Counsel in relation to those provisions. We conclude that while it may not be crystal-clear whether or not any particular provision applies to require disqualification in itself, the likelihood that every one of them could be reasonably viewed as applicable is sufficient to permit the conclusion that "the judge's impartiality might reasonably be questioned."

A.

First, we inquire 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 under

[3] Nor shall we repeat here the admonition applicable to all judges as to the acquisition of "personal knowledge of disputed evidentiary facts" through their spouses. Advisory Opinion No. 2, part B at pp. 7-8, discussing present Canon 3E(1)(a). See also Advisory Opinion No. 6 at pp. 7-8, discussing the same issue in the context of an Assistant United States Attorney as the spouse of a judge sitting on criminal matters, and more generally Federal Judicial Conference Committee on Code of Conduct Advisory Opinion No. 60 (as reviewed Jan. 16, 1998), dealing with the appointment of the spouse of an Assistant United States Attorney as a part-time magistrate judge..

Canon 3E(1)(d)(i). In Advisory Opinion No. 2, we observed that it might be thought that the drafters had in mind an "officer" of a private or commercial entity, but that nonetheless there was authority that officials of governmental agencies are "officers" within the meaning of the canon. With respect to a Deputy Chief of Police, we assumed that he was an "officer," but of the Metropolitan Police Department, which was not itself a "party." The Corporation Counsel, however, has responsibilities extending across the full range of the executive branch and is plainly one of the top officials of the government of the District.

B.

Second, we address whether Corporation Counsel can be deemed to have a "more than de minimis interest[4] that could be substantially affected by the proceeding" under Canons 3E(l)(c) and (d)(iii). In Advisory Opinion No. 2, we noted that the Deputy Chief of Police, "as a salaried government

[4] A "de minimis interest" is defined, somewhat circularly, as "an insignificant interest that could not raise reasonable question as to a judge's impartiality."

official, has no financial interest that would be substantially affected." While in a more general sense, he had an interest in the successful outcome of criminal proceedings, we concluded that such considerations were too indirect to require across-the-board recusal. We did express the view, however, that the judge should recuse in cases where officers testifying in a criminal proceeding were assigned to the First District, commanded by the spouse. Even though some 500 officers were assigned to that district, we thought that the "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...that might be substantially affected by the outcome of proceedings before the judge."

We think this state of affairs is even more compelling in the case of Corporation Counsel and his relation to the attorneys serving under him and the outcome of cases for which he is ultimately responsible. The number of attorneys in the Corporation Counsel's office is less than the number of officers in the First District and the relationship of the outcome of those cases to the duties of the Corporation

Counsel more direct than in the case of a commanding officer of a police district to a criminal conviction. Furthermore, it would be unusual for a high-ranking police officer to move into a corresponding field in the private sector, while a Corporation Counsel might well be anticipating a future relationship with a private law firm or a corporate position where the overall performance of the office which he is now heading could be a factor in those employment prospects.

C.

Third, we consider whether Corporation Counsel should be considered as "acting as a lawyer in the proceeding" where the District is a party under Canon E(l)(d)(ii). The commentary to that subsection notes that "[t]he fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge." However, even though a number of layers of responsibility may exist between Corporation Counsel and the attorney actually appearing before the judge, nonetheless the regular practice, as we

understand it, is for the name of Corporation Counsel to appear on all court filings. Furthermore, Corporation Counsel, under the statutory sections quoted above, not only bears responsibility but has ultimate "direction and control" of the attorney acting for the District.

The relevance of the concept of supervisory power and responsibility also factored into our Advisory Opinion No. 6. There we were addressing the question whether a judge of the Superior Court must recuse 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 in that office. We concluded that while the judge should recuse from any proceeding in which the spouse had participated at any stage, recusal was not otherwise ordinarily mandated. We distinguished the situation from that in Advisory Opinion No. 2, noting that none of the considerations derived from the police official's status as a supervisor or command-level employee concerned us, because the Assistant United States Attorney had no such responsibilities in relation to

other prosecutors who might be assigned to the proceedings before the judge.[5]

II.

With the foregoing considerations in mind, we now address the specific questions as phrased by the judge:[6]

1. Question: "Does the fact that a judge's spouse serves as the Corporation Counsel disqualify the judge from handling post-adjudication neglect reviews, where an assistant corporation counsel, six levels removed from the judge's spouse, may appear before the judge? If the spouse's office were able to implement a procedure which relieved the spouse of supervisory responsibility over the neglect reviews handled by the judge, would disqualification still be necessary?"

Answer: The judge here is referring to the neglect reviews that are a specific category of proceedings in the

[5] The importance of command and supervision is also reflected, for example, in the two-year ban on direct government contacts by former government officers with respect to matters under their "official responsibility." 18 U.S.C. § 207(a)(2).

[6] The judge has agreed that a sixth question relating to possible issues that might arise should the spouse leave the position of Corporation Counsel can await that future time and circumstance.

Family Division. See D.C. Code § 16-2323 and D.C. Super. Ct. Negl. R. 22. Consistent with Superior Court policy and practice, she was assigned a neglect review caseload of approximately fifty cases upon her appointment to the court. She advises us: "All active judges of the Superior Court are required to maintain for judicial review a caseload of children who have been adjudicated abused and/or neglected. There are currently over 5,000 neglect reviews on the Superior Court docket and the cases make up a significant portion of each judge's caseload." She further advises: "A neglect review is a post-adjudication matter. They are typically non-adversarial and uncontested and in the majority of the cases no assistant corporation counsel appears."

Notwithstanding the often routine nature of these proceedings, we think they must be considered to fall within the broad category of litigation involving the District and hence the Corporation Counsel. The structure of District law dealing with cases of child neglect mandate

that conclusion. "The District of Columbia shall be a *party* to *all* proceedings under this subchapter [Proceedings Regarding Delinquency, Neglect, or Need of Supervision]." § 16-2305(f). (emphasis added). All neglect petitions are prepared and filed by Corporation Counsel. § 16-2305(c), (d). Corporation Counsel presents evidence in support of petitions and shall "otherwise represent the District of Columbia in all proceedings." § 16-2316(a). The District as a party and Corporation Counsel as its attorney receive notice of all neglect review proceedings, Super. Ct. Negl. R. 22(a). In short, such hearings are an integral part or-the statutory scheme and even if often routine are potentially subject to intense controversy. *See, e.g., In re T.R.J.*, 661 A.2d 1086 (D.C. 1995).

We do not think the six degrees of supervision can be a distinguishing factor. Ultimate responsibility rests with Corporation Counsel. Furthermore, it is not readily apparent to us how, given his statutory responsibility and the extended bases raising disqualification issues as

discussed above, such concerns could be effectively alleviated simply by some internal office procedure. We therefore conclude that, in the first instance, the judge should be prepared to recuse herself from even neglect review cases.

We say "prepared to recuse herself" because it is both possible and feasible for the subsection on "Remittal of Disqualification" to apply in such circumstances. As already indicated, it is the provisions of Canon 3E which form the bases for recusal in the circumstances before us. Canon 3F specifically provides that in such cases,[7] the judge "may disclose on the record the basis for the disqualification [i.e., the position of the judge's spouse as Corporation Counsel] and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification." If "all agree that the

[7] Although it is not entirely clear, it appears that Canon 3F does not authorize the use of this waiver procedure in cases where the ground of recusal is that the judge has "personal bias or prejudice concerning a party" under Canon 3E(I)(a). Advisory Opinion No. 2 makes no suggestion that this provision would be applicable where the spouse is a high-ranking official and we see no reason why it should be a ground for disqualification here simply because the District is a party.

judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding." Canon 3F further provides: "The agreement shall be incorporated in the record of the proceeding," and the comment thereto adds: "As a practical matter, the judge may wish to have all parties and their lawyers sign the remittal agreement," although it also notes that a party may act through counsel "if counsel represents on the record that the party has been consulted and consents."

2. Question: "Is the judge disqualified from all contested criminal cases and civil matters where the District of Columbia is represented by the Office of the Corporation Counsel?"

Answer: Yes, but with the possibility of remittal of disqualification under Canon 3F.

3. Question: "If the Committee concludes that disqualification might be appropriate, is it a disqualification that bars handling of the case unless affirmatively waived by the parties under Canon 3F?"

Answer: Yes, as discussed in connection with question one above, disqualification based solely upon the spouse's position as Corporation Counsel may be waived in accordance with the requirements of Canon 3F. Note that the lawyers as well as the parties (who may, however, act through counsel as specified in the commentary) must agree that the judge should not be disqualified.

4. Question: "Is the spouse's employment a potential problem that must be disclosed on the record at the initial hearing in all such cases for an on-the-record debate pursuant to the Remittal Disqualification procedures of Canon 3F?"

Answer: We assume the "initial hearing" refers to the first time that the judge sits in a particular matter. We note at the outset that the application of Canon 3F is optional with the judge. She may, if she wishes, decide to recuse without seeking such a remittal. We understand, however, that the workload and responsibilities of all the

Superior Court judges with respect to neglect reviews makes the judge reluctant to do so on a blanket basis.

If the judge decides to present the possibility of a Canon 3F remittal, it requires that the judge disclose "on the record the basis of the judge's disqualification." The consideration of agreeing to a waiver of that disqualification, however, is to take place "out of the presence of the judge" and "without participation by the judge." We think that such discussions almost necessarily should be off the record, especially since they may well involve attorney-client discussions. However, the agreement itself, once reached, must be "incorporated in the record of the proceedings," and, if a party acts through counsel, that counsel must "represent[] on the record that the party has been consulted and consents."

5. Question: "Is the spouse's employment merely a potential appearance problem that once disclosed allows the judge to handle the case unless one of the parties requests recusal?"

Answer: No. Canon 3E(l) states that a judge "shall disqualify himself or herself" in the circumstances thereafter listed, which are applicable here. Hence the procedures of Canon 3F must be followed if the judge is not to recuse.