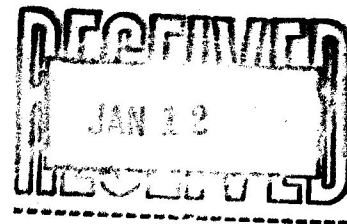


JUDICIAL ETHICS COMMITTEE  
Advisory Opinion 08-1  
Issued: January 5, 2009



Issue

Is a Judge of the Superior Court required to recuse in cases in which the Maine Attorney General's office is involved if the Attorney General is the sister of the Judge's spouse?

Facts

A Superior Court justice is married to the brother of the newly elected Attorney General. She has asked for guidance as to whether this requires recusal for cases involving the Attorney General's office, with particular attention to homicide cases prosecuted by the criminal division of the Attorney General's office and to the AMHI Consent Decree which the justice has overseen since 1994.<sup>1</sup>

Applicable Provisions

Canon 3E (1) and (2) of the Code of Judicial Conduct provide in pertinent part as follows:

(1) A judge shall disqualify himself or herself on the judge's own initiative in any proceeding in which the judge has reason to believe that he or she could not act with complete impartiality. A judge acting under this subsection (1) need not state the grounds of disqualification.

(2) A judge may disqualify himself or herself on the judge's own initiative without stating the grounds for disqualification, and shall disqualify himself or herself on a motion for recusal made by a party, in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

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<sup>1</sup> The membership of the Judicial Ethics Committee includes the Attorney General or a designee from the Attorney General's office. However, neither the Attorney General nor his designee participated in this advisory opinion.

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer.

\* \* \* \* \*

(d) the judge or the judge's spouse or a person within the third degree of relationship to either of them, or the spouse of such a person . . .

(ii) is acting as a lawyer in the proceeding.

(emphasis added).

Under the Definitions section in Part II of the Code of Judicial Conduct, brothers and sisters are within the third degree of relationship. Code, Part II, Section 3(P).

#### Discussion

The issue, as the Committee understands it, is whether under the circumstances disqualification is required under Code 3E(2)(d)(ii) even if the judge has no reason to believe that the judge cannot act with complete impartiality.<sup>2</sup>

Initially, although disclosure would be required under Canon 3E(3), disqualification would not be required under Canon 3E(2) unless one of the parties seeks recusal. If one of the parties seeks recusal, it is evident that the judge's spouse is within the third degree of relationship to the Attorney General and disqualification would therefore be required under 3E(2)(d)(ii) so long as the Attorney General is "acting as a lawyer" in any given proceeding.

The Attorney General has the right to direct and control all the lawyers in the Attorney General's office, and the Attorney General's office (with a few limited exceptions) represents the State, State agencies, and State officers in all legal proceedings. It is rare that an Attorney General will personally appear as counsel in a

<sup>2</sup> Disqualification would be required under Canon 3E(1) if a judge has reason to believe that he or she could not act with complete impartiality but the Committee assumes that the justice sees no impediment on that score.

case where the State is represented by the Attorney General's office. However, there are many cases where the Attorney General is personally involved in legal decisions relating to a given case. For instance, ordinarily the Attorney General either directs or approves the major decisions made by his or her staff in important cases. The Committee would expect this to be true with respect to homicide cases and the AMHI Consent Decree.

Other cases in which the Attorney General's office represents the State are handled by members of the Attorney General's staff without any direct involvement by the Attorney General. However, even in routine cases where the Attorney General ordinarily would have no involvement of any kind, unexpected developments might result in a situation where the Attorney General becomes involved.

It is the Committee's view that the Attorney General is acting as a lawyer in all cases where the Attorney General is personally involved in directing or approving decisions by her staff. A judge whose spouse is the brother of the Attorney General would therefore be required to recuse in such cases if requested to do so by any party. However, if no party objects after disclosure of the potential issue, there would be no violation of the Code.

Lastly, the Attorney General could obviate any issue as to judicial disqualification in a given case by formally disqualifying herself from any participation with respect to that case and by delegating final decision-making authority in that case to a designated member of the Attorney General's staff. It is our understanding that in certain instances present and former Attorneys General of the United States have issued orders removing themselves from any discussion, participation, or decision-making role with respect to a specified case. If the Maine Attorney General were to elect to do that in a specific case or category of cases, the need for disqualification by the judge would

appear to be eliminated even if a party objected because the Attorney General would no longer be acting as a lawyer with respect to that case.