JUDICIAL ETHICS COMMITTEE
OF THE
ADVISORY COMMITTEE ON THE CODE OF JUDICIAL CONDUCT

Question: Judge J is married to an attorney employed by the office of the Attorney General. We paraphrase the judge's inquiry as follows: "Under what circumstances must I recuse myself when an attorney from the Attorney General's Office appears in a matter pending before me?"

Response[1]:

1. Cases involving lawyers from the Attorney General's Office who are not members of the Criminal Division.

As we understand it, it is Judge J's general intention to recuse herself from all cases in which an attorney from the Criminal Division of the Attorney General's Office appears before her as long as her husband supervises the Assistant Attorney General in that division. Judge J's first question involves whether she should recuse herself from matters involving the members of the Attorney General's Office who are not members of the Criminal Division, such as members of the Human Services Division who appear in child protection cases and members of other divisions who appear for AMHI and BMHI commitment hearings. Such cases are not an insignificant part of the District Court's caseload. In our view, Judge J is not required to recuse herself in civil cases handled by other divisions of the Attorney General's Office.

The existing Code of Judicial Conduct provides that "a judge should disqualify himself in any proceeding in which he has reason to believe that he could not act with complete impartiality, or in a proceeding in which his impartiality might reasonably be questioned." Canon 3C(1). This rule is restated and elaborated upon in Canon 3E of the proposed 1991 Code of Judicial Conduct that has been forwarded to the Supreme Judicial Court by the Advisory Committee. Also relevant is Canon 2B, which provides that a judge shall not allow family relationships to influence the judge's official conduct. In the discussion that follows, we assume that Judge J has no reason to believe that she cannot act with complete impartiality and that she will not be influenced by her family relationships. If so, Canons 2B and proposed 3E(1) are satisfied, and the remaining issue is whether the cases in question are cases in which "the judge's impartiality might reasonably be questioned." Proposed Canon 3E(2); second clause of existing Canon 3E(1).

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[1]The substance of this opinion was originally prepared by Deputy Attorney General Thomas D. Warren, who is a member of this Committee. However, it appeared to him and to the Chairman that he should not participate in the decision respecting this inquiry because of his position in the Attorney General's Office. He nonetheless offered to conduct research and to offer assistance as to the question raised, and so he prepared a memorandum to assist the Committee in its determination. This matter was then assigned to another member of the Committee, who reviewed Mr. Warren's memorandum and adopted it as his own. The re-stated opinion has been adopted by all members of the Committee as the Committee's opinion. Committee member Warren recused himself from participating in the Committee's deliberations and final determination as embodied in this opinion.

Judge J's husband has no involvement in or responsibility for civil cases, none of which are handled by the Criminal Division of the Attorney General's Office. We are advised that only in exceptional circumstances are civil cases handled by other divisions ever even discussed with Judge J's husband. In addition, unlike the situation in a private law firm (where a member of the firm could derive financial benefit even from a case in which he or she had no personal responsibility or involvement), lawyers in a government law office do not have any financial interest in the outcome of cases handled by other lawyers in the office. As the Law Court noted in Superintendent of Insurance v. Attorney General, 558 A.2d 1197, 1203 (Me. 1989), "the Attorney General and his staff are not the equivalent of a private law firm."[2]

Under these circumstances, it is our view that Judge J's impartiality could not reasonably be questioned with respect to civil cases handled by Assistant Attorneys General from divisions other than the Criminal Division.

This conclusion is supported by the commentary to the 1990 ABA Model Code of Judicial Conduct from which the proposed 1991 Maine Code was adopted. Like proposed Canon 3E(2)(b) of the 1991 Maine Code, ABA Canon 3E(1)(b) provides that one instance in which a judge's impartiality might reasonably be questioned is when "a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter [in controversy]." The ABA comment states, however, that "a lawyer in a governmental agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of section 3E(1)(b)."

Another instance in which the 1990 ABA Code and the proposed 1991 Maine Code suggest that a judge's impartiality might reasonably be questioned is when the judge's spouse "is acting as a lawyer in the proceeding." Proposed 1991 Maine Canon 3E(2)(d)(ii); ABA Canon 3E(1)(d)(ii). The ABA comment makes clear, however, that "the 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." ABA Canon 3E(1)(d)(ii) and proposed Maine Canon 3E(2)(d)(ii) thus disqualify a judge only where a spouse or other close relative is personally acting as a lawyer in the proceeding.

Neither proposed Canons 3E(2)(b) or 3E(2)(d)(ii) rule out disqualification in a case where a judge's spouse, although not personally acting as a lawyer in the proceeding, has a more than de minimis interest that could be substantially affected by the proceeding. See proposed Canons 3E(2)(c), 3E(2)(d)(iii). However, we are advised that Judge J's spouse does not have any interest that could be affected by civil cases litigated by other divisions in the Attorney General's Office.

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[2] In that case the Court quoted from Opinion No. 342 of the ABA Committee on Ethics and Professional Responsibility which stated:

> The relationships among lawyers within a governmental agency are different from those among parties and associates of a law firm. The salaried governmental employee does not have the financial interest in the success of departmental representation that is inherent in private practice.

Id.

The conclusion that Judge J need not recuse herself from civil cases involving members of the Attorney General's Office from outside her husband's division is supported by Opinions issued by the relevant advisory committees in Alabama (Opinions 87-305, 86-277, 83-171, and 80-90), Ohio (Opinion 87-024), Georgia (Opinion No. 72), and Indiana (Opinion 1-89).[3]

This conclusion is also supported by the opinion of the Supreme Court of Kansas in State v. Logan, 689 P.2d 778, 784-85 (Kan. 1984), which rules that the employment of the judge's son by the district attorney's office did not mean that the judge's impartiality might reasonably be questioned so long as the son had had no involvement in the case. But see Smith v. Beckerman, 683 P.2d 1214, 1216 (Colo. 1984) (appearance of partiality exists where judge's wife works in the prosecutor's office).

In evaluating the above opinions, it bears emphasis that they are not squarely apposite to the question raised by Judge J because they involve situations where the judge's spouse or child performs the same general work (i.e., criminal prosecution or defense) as the other members of the office who are appearing before the judge. In the case posed by Judge J, however, the members of the Attorney General's Office appearing before her are not prosecutors like her husband but are performing wholly different functions and work for different organizational units within the Attorney General's Office. Thus, if a judge whose spouse works for a district attorney's office is not disqualified from presiding over cases handled by other prosecutors in that office,[4] disqualification would be even less called for in this situation.

Two other points should be made. First, although unusual, it is at least conceivable that a civil case handled by a different division of the Attorney General's Office might generate a referral to the Criminal Division. For instance, there might be an ongoing child protection proceeding in which a child died under circumstances that would be investigated as a possible homicide. Because Judge J might not be aware of such a referral, we would propose that attorneys in other divisions of the Attorney General's Office be instructed to advise Judge J if for any reason there had been any referral to or consultation with the Criminal Division, in which case she could recuse herself at that point.

Second, we understand that there is the occasional criminal case handled by an Assistant Attorney General who is not within the Criminal Division.[5] Because it is likely that the Criminal Division would nevertheless be consulted on such cases, we would expect that Judge J would recuse herself from all criminal cases handled by the Attorney General's Office, not just those cases handled by the Criminal Division.

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[3]Utah Opinion 88-3 reaches a different conclusion with respect to members of a public defender's office but suggests that a distinction should be drawn between public defenders' offices and prosecutors' offices for purposes of such disqualification.

[4]Because Judge J's husband is the supervisor of the Criminal Division, it makes sense that she should recuse herself in all Criminal Division cases, leaving open the question of whether she would have to recuse in all such cases if her spouse were merely one of the prosecutors in the Division.

[5]The Criminal Division of the Attorney General's Office handles all homicide prosecutions, certain drug prosecutions, certain white collar crime prosecutions, and conflict cases from the District Attorney's offices. Some white collar crimes, such as fraud cases and environmental crimes, are prosecuted by Assistant Attorneys General from other divisions.

2. Disclosure under proposed Canon 3E(3).

Judge J also asks whether she should disclose her husband's affiliation with the Attorney General's Office in cases where members of the Attorney General's Office from other divisions appear before her. We believe she probably should make such a disclosure under proposed Canon 3E(3) because the standard for disclosure is lower than the standard for recusal. Indeed, this would give Judge J the opportunity to ask the Assistant Attorney General in question if there has been any consultation with or involvement by the Criminal Division. Assuming the answer to that question is no, she would not be automatically obligated to recuse if the other party objected after hearing of her husband's affiliation. Thus, we would not agree with the suggestion that she should recuse any time a party objects. Instead, she would have to make that decision based on whether there is a specific reason to recuse in the given case.

3. Questions involving arraignment.

Judge J also asks about arraignments in drug prosecutions and conflict cases referred to the Attorney General's Office by the district attorneys. In such cases, an Assistant District Attorney may stand in at arraignment. It would seem that the appropriate course of action would be for Judge J, in any criminal case that she was aware might actually be an Attorney General case, to make an inquiry to that effect at arraignment. In the event that the case was identified as an Attorney General case, she could refer the matter to another judge if one is available.

The harder question is what she should do if no other judge was available. Given the requirement, in light of the Supreme Court's decision last term in County of Riverside v. McLaughlin, that defendants arrested without warrant be arraigned within 48 hours, this question would appear to implicate the rule of necessity contained in proposed Canon 3E(4). Where no other judge could be available within the requisite time period, it would be our view that Judge J should preside at the arraignment under proposed Canon 3E(4). The issue of bail is the only issue that is likely to be contested at arraignment, and in many cases there is also no dispute as to bail. In the event that bail is contested by a defendant in custody, 15 M.R.S.A. § 1028 provides for an extremely prompt appeal to the Superior Court, where a de novo determination of bail may be obtained. Thus, applying the rule of necessity in such a case would not significantly prejudice the defendant.[6]

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[6]The only exception to the availability of a de novo determination of bail by a Superior Court is in the case of formerly capital offenses, which are governed by 15 M.R.S.A. §§ 1027 and 1029(2). In those cases, the statute calls for a "Harnish bail proceeding" to be held within 5 days if the State so requests. 15 M.R.S.A. § 1027(2). If such a hearing is held, the standard of appellate review on the issue of whether there is probable cause to believe that the defendant committed a formerly capital offense would be the clearly erroneous standard; on other issues appellate review is de novo. § 1029(2). Such cases will ordinarily be handled by the Criminal Division of the Attorney General's Office. If the State requests such a hearing in a case before Judge J, she could schedule the hearing so that it would be held five days later before another judge. If scheduling creates a problem, the five days can be extended for good cause. 15 M.R.S.A. § 1027(2).