JUDICIAL ETHICS COMMITTEE
Advisory Opinion No. 96-2
Issued: May 8, 1996

Facts:

A judge is specially assigned to a pending lawsuit brought by a woman who was hit by a truck in the parking lot of her employer. The judge set a trial date and scheduled argument on a pending motion for summary judgment filed by a third party defendant. On the morning scheduled for argument on the summary judgment motion, the judge learned from the judge's spouse, who is an attorney, that the judge's spouse had briefly represented the former husband of the plaintiff. Specifically, the judge's spouse advised the judge that that plaintiff's former husband had consulted the judge's spouse in connection with a divorce between the former husband and the plaintiff, that this consultation had occurred after the accident that formed the basis for the lawsuit pending before the judge but before that lawsuit had been filed, that the former husband had subsequently retained another attorney, and that no compensation had been received by the judge's spouse and there were no bills outstanding.

At the hearing on the summary judgment motion, pursuant to Canon 3(E)(3), the judge disclosed to the parties that the plaintiff's former husband had briefly been represented by the judge's spouse, together with the remaining facts then known to the judge. Oral argument then proceeded on the motion.

Subsequently, the judge's spouse was contacted by counsel for the owner of the truck, who was seeking additional information to determine if there was a reason to seek disqualification. The spouse advised the judge of this contact. Three items of additional information were communicated to the judge by the judge's

spouse at that time: (1) that a loss of consortium claim by the former husband against the owners of the truck that had hit the plaintiff had been discussed with the judge's spouse in connection with the divorce matter, (2) that the former husband had retained another attorney at least in part because of a difference in opinion with respect to the value of the loss of consortium claim in the context of the divorce; and (3) that the judge's spouse had just been advised by counsel for the owner of the truck that the loss of consortium claim had eventually been settled for an undisclosed amount. Beyond these basic facts, and those originally provided by the judge's spouse on the morning of the hearing on the summary judgment motion, no other information was provided to the judge by the judge's spouse.

Thereafter, counsel for the owner of the truck, stating that the plaintiff's former husband would be a likely witness at trial, wrote a letter requesting recusal.

Issue:

Whether, under the above circumstances, disqualification is required under Canon 3(E).

Analysis:

As the Advisory Committee Note explains, Canon 3(E) contains both a subjective standard and an objective standard for disqualification. The subjective standard is contained in Canon 3(E)(1), provides that 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." It is our understanding that the judge does not believe, either based on the former involvement of the judge's spouse or for any other reason, that the judge cannot act with complete impartiality.

As a result, the operative provision of the Code of Judicial Conduct is the objective test contained in Canon 3(E)(2), which provides that a judge "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:

> (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;
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> (b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;
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> (c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, 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;
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> (d) the judge or the judge's spouse, or a person with the third degree of relationship to either of them, or the spouse of such a person:
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> (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;

(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.

The subsections of Canon 3(E)(2) that expressly require disqualification based on circumstances involving a judge's spouse are 3(E)(2)(c) and (d), but those subsections do not apply here because the judge's spouse has no economic or other interest that could be substantially affected by the proceeding. Moreover, while subsection 3(E)(2)(a) requires disqualification if the judge acquires "personal knowledge of disputed evidentiary facts concerning the proceeding," the information communicated to the judge by the judge's spouse in this case does not fall within that category. Finally, subsection 3(E)(2)(b) addresses a judge's former activities as a lawyer and the activities of lawyers with whom the judge previously practiced law, and thus is not relevant to the instant case.

There remains the question of whether, under the circumstances outlined above, the judge's impartiality still "might reasonably be questioned," which would require disqualification under the general rule stated in Canon 3(E)(2). We do not believe that the facts in this case yield the conclusion that the judge's impartiality might reasonably be questioned under the circumstances outlined above.

First, the matter on which the judge's spouse briefly represented the former husband involved a divorce matter whose only relationship to the issues in the case

pending before the judge involved the tangential issue of the former husband's loss of consortium claim. The judge's spouse considered that claim in the context of the divorce proceeding but never took any steps to pursue that claim. The loss of consortium claim is not at issue in the case pending before the judge.

Second, the representation of the former husband by the judge's spouse lasted for a brief period, was uncompensated, and was concluded before the pending case was filed. Indeed, since the former husband retained another attorney before the judge's spouse took any significant action in the divorce proceeding, the role of the judge's spouse does not appear to be materially different from that of an attorney who was interviewed but ultimately not retained.

Third, the information communicated to the judge by the judge's spouse in this case is not the kind of information that could reasonably predispose the judge toward one side or the other in the pending case. There is no basis to conclude that the judge's spouse has knowledge with respect to any significant facts in the pending case. Moreover, if the judge's spouse does have knowledge or opinions with respect to pertinent evidentiary facts, such knowledge or opinions have not been shared with the judge. Thus, unlike the situation in *In re Faulkner*, 856 F.2d 716 (5th Cir. 1988), this is not a situation where a close relative of a judge possesses significant knowledge and strong opinions with respect to key facts in the case and has communicated those facts and opinions to the judge.

Lastly, the hypothetical possibility that a judge might harbor some antipathy toward a former client of the judge's spouse who had retained another attorney is

simply too remote and speculative to warrant disqualification, particularly where the former client is not a party in the case before the judge but merely a witness.

In sum, while we agree that disclosure of the prior representation was appropriate under Canon 3(E)(3), we do not believe that the judge's impartiality might reasonably be questioned in this case and we therefore do not believe that disqualification is required.

In reaching this conclusion, we would emphasize that the issue of whether a judge's impartiality "might reasonably be questioned" in a given case necessarily involves a fact–specific inquiry under the particular circumstances in question, and variations in the facts might lead to a different result. We are mindful that there are a number of current judges on the Maine bench who are married to lawyers, and in a small state, it is not unusual for such a judge to come across cases in which his or her spouse has had some involvement. Such involvement requires careful consideration to determine whether recusal is required. However, where such involvement is as tangential as it was in this case, recusal is not required.

This is consistent with Canon 3(B)(1), which provides that "a judge shall hear and decide matters assigned to the judge except those in which disqualification is *required*" (emphasis added). The Advisory Committee Note to that provision states that it "is intended to emphasize the judicial duty to sit and to minimize potential abuse of the disqualification alternative by making clear that only bona fide disqualification will remove the obligation to hear and decide a matter." Advisory Committee Note to Canon 3, Commentary, quoting in part from the ABA

Committee Note to Section 3B(1) of the 1990 ABA Model Code of Judicial Conduct. Thus, because disqualification can often disrupt and delay a case, the Code of Judicial Conduct does not require judges to indulge every possible presumption in favor of disqualification. Instead, it directs them not to disqualify themselves except where disqualification is in fact required by Canon 3(E).