

Advisory Committee on the Code of Judicial Conduct

Hon. Frank H. Allen, Jr. Chairman
Hon. Theresa M. Baca
Hon. Thomas A. Donnelly

May 6, 1991

The Honorable

Re: 91-1

Dear Judge

In your letter of April 26, 1991, you have pointed out that your husband has recently accepted employment as an attorney in the felony division of the public defender's office in the _____ Judicial District. You have requested an advisory opinion regarding what you must do to preserve your impartiality and to avoid the appearance of impropriety in serving as a Judge of the _____ Court in criminal cases assigned for hearing in your division.

Two canons of the Code of Judicial Ethics are directly applicable to your inquiry. Canon 21-200 provides, in part:

B. Impartiality. A judge shall not allow his family, social or other relationships to influence his judicial conduct or judgment. He shall not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others subject to his control to convey the impression that they are in a special position to influence him.

Additionally, Canon 21-400 provides, in part:

A judge is disqualified and shall recuse himself in any proceeding in which:

...

D. Family relationship. He or his spouse, or a person within the third degree by blood, marriage or other relationship to either of them:

(1) is a party to the proceeding, or an officer, director or trustee of a party;

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

(3) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(4) is to the judge's knowledge likely to be a material witness in the proceeding.

In New Mexico Judicial Advisory Committee Opinion 87-6 (October 7, 1987), this committee previously addressed the question of the responsibility of a judge whose son served as a prosecutor in the same judicial district. We have attached a copy of that opinion hereto. We believe that similar restrictions apply to your situation. We have also attached a copy of New Mexico Judicial Advisory Committee Opinion 87-2 (April 20, 1987), which we think also is instructive.

In particular, we call your attention to our conclusion in Opinion 87-6, in which we stated: "[A] judge is required to recuse himself in a cause wherein his son or any relative within the third degree has participated in the case or has entered an appearance of counsel." See also Op. 87-2. We conclude that in your case the same requirement applies. The judge has no discretion in this matter; if the circumstances described in Canon 21-400 apply, the judge has a duty to recuse herself from the proceeding. See New Mexico Judicial Advisory Committee, Op. 87-7 (October 14, 1987).

Employees of the public defender office are not disqualified from practicing before a judge whose spouse is also an employee in the public defender's office. See Op. 87-6 (citing Committee on Professional and Judicial Ethics of the State Bar of Michigan, Op. CI-703, Lawyers' Manual on Professional Conduct (ABA/NBA) 801:4833 (1984)). We conclude that even when your husband is not acting as an attorney of record in a criminal proceeding pending before you as a _____ Court Judge, you should, however, inform prosecutors who appear before you of the relationship and allow them the opportunity to submit a challenge for cause. See id. (citing Alaska Bar Ass'n, Op. 82-2, Lawyers' Manual on Professional Conduct (ABA/BNA) 801:1201 (1985)).

Although Canon 21-400 does not require recusal where the spouse-attorney has not entered an appearance or participated in the case and has no interest in its outcome, Canon 21-200 requires that a judge recuse herself in any proceeding wherein an appearance of impropriety may arise. New Mexico courts follow the rule that a judge should recuse herself in cases in which her impartiality might be questioned by a reasonable person with knowledge of the circumstances. Op. 87-2 (citing State v. Logan, 236 Kan. 79, 689 P.2d 778 (1984)). In Opinion 87-2 we noted:

The
Honorable
May 6, 1991
Page 3

Where the wife or husband of a judge, however, is employed as an attorney by a governmental agency and does not appear or participate in a case pending before the judge, the judge is not required to recuse except where an appearance of impropriety may occur as determined under the "reasonable person standard" set forth in State v. Logan.

In sum, we conclude that it is ethically proper for you to hear cases in which the public defenders appear as counsel of record, provided that you recuse yourself in any case in which your husband appears as an attorney of record or as a witness. In each case where your husband does not appear as an attorney of record, however, you should inform all prosecutors who appear before you of your relationship. Further, you should recuse yourself in any case in which your relationship would raise a question of impropriety in a reasonable mind.

Yours very truly,

Frank H. Allen, Jr.
Chairman, Judicial
Advisory Committee

Encls.
Advisory Ops. 87-2
and 87-6