



Advisory Committee on the Code of Judicial Conduct

Hon. Frank H. Allen, Jr. Chairman
Hon. Thomas A. Donnelly
Prof. William T. MacPhearson, Jr.

May 13, 1998

Honorable

Re: Judicial Advisory Opinion 98-03

Dear Judge

You have asked this committee to advise you concerning the effect of your wife having recently accepted the position _____ Regional Manager for Adult Probation and Parole Division of the Department of Corrections which includes the counties situated in the _____ Judicial District where you are a District Judge and preside over criminal cases.

As a judge presiding over criminal cases you having dealings with and receive recommendations from adult probation and parole field officers. Although you would have no direct contact with the Regional Manager, she is the one ultimately responsible for the operation of the field officer and the recommendation that they make to you concerning probation violations.

Your attention is directed to the following provisions of Section 21-400. Disqualifications.

A. Recusal. A judge is disqualified and shall recuse himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(5) 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.

(c) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding.

D. Definitions. As used in this rule:

(1) "de minimis" means an insignificant interest that could not raise reasonable question as to a judge's impartiality .

Since your spouse's duties include supervisory responsibility for adult probation and parole officers within a portion of the region that you preside as a criminal trial judge we believe that her interest is not "de minimis."

In deciding if the judge's impartiality might reasonably be questioned, the test is whether a person of ordinary prudence, placed in the judge's position and knowing the facts, would find a reasonable basis for questioning the judge's impartiality.

In view of the facts you have informed us of that you would receive recommendation from probation officer that were supervised by your spouse it is this committee's opinion that there is a reasonable basis for questioning impartiality.

This committee also believes this is a matter which can be easily dealt with under 21-400C.

C. Remittal of disqualification. A judge disqualified by the terms of Paragraph A of this rule may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceedings. The agreement shall be incorporated in the record of the proceeding.

The commentary to 21-400 indicates the information to be disclosed.

A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

We understand from your letter that you do not consider your judicial position to be in conflict with your spouse's new position but we believe that a criminal defendant faced with the loss of liberty by a recommendation from a _____County Probation Officer might reasonably question your impartiality even though there would be no basis in fact.

Very truly yours,

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