

ADVISORY OPINION

Code of Judicial Conduct Canon 3

#4-93

The Indiana Commission on Judicial Qualifications issues the following advisory opinion concerning the Code of Judicial Conduct. The views of the Commission are not necessarily those of a majority of the Indiana Supreme Court, the ultimate arbiter of judicial disciplinary issues. Compliance with an opinion of the Commission will be considered by it to be a good faith effort to comply with the Code of Judicial Conduct. The Commission may withdraw any opinion.

ISSUE

The issue is whether the appearance of a lawyer who is the spouse of a continuing part-time or a full-time judicial officer requires the disqualification of the regular judge.

ANALYSIS

The Code of Judicial Conduct requires a judge to disqualify if the judge's spouse or relative within the third degree is acting as a lawyer in the proceeding, Code of Judicial Conduct, Canon 3E(1)(d)(ii), and whenever the judge's impartiality might reasonably be questioned. Canon 3E(1). When an attorney in a proceeding is married to one of the court's commissioners, magistrates, or referees, the spouse obviously is disqualified. The question is whether disqualification is required of the regular judge when an attorney is married to or is a close relative of one of the judge's judicial officers.

A per se rule of disqualification under these facts alone would presume a legitimate concern that the judge will have a propensity to rule differently because of the attorney's relationship with the judicial officer. The Commission is not inclined to adopt that presumption. A judge is not necessarily disqualified when a lawyer appears who is affiliated with the judge's spouse, see, Commentary, Canon 3, when the lawyer is the judge's cousin, see, Advisory Opinion #3-90, or when the lawyer is married to the judge's bailiff, see, Advisory opinion #4-89. So long as the judge discloses on the record to all parties the fact of the lawyer's relationship to the judicial officer, disqualification based upon the relationship alone is not required.

Another concern, however, is the potential appearance that the attorney is in a favored position by virtue of the relationship to the court employee. First, both the attorney and the spouse have specific ethical duties to protect the tribunal from appearances of

impartiality and to not exploit the relationship for the benefit of the practitioner. The practitioner may neither attempt to improperly influence the court through the relationship, Rules of Professional Conduct, Rule 3.5(a), nor imply an ability to influence the court, Rule 8.4(e). The commissioner, magistrate, or referee may not engage in improper ex parte communications, Canon 3B(8), and may not comment on any proceeding in a manner which might be expected to affect its outcome or fairness. Canon 3B(10).

In Advisory Opinion #4-89, the Commission addressed the court's duties when an attorney appears who is the spouse or near relative of a court employee. The Commission advised that the court should not allow the employee to participate in any way in the proceedings, and suggested that the judge issue an order stating that the intent of the court was to eliminate appearances of impropriety, that the employee was not to act in any capacity on cases involving the relative, and that neither was to discuss pending court cases with the other. A similar Order would be appropriate under the circumstances described in this opinion.

CONCLUSION

The fact that a lawyer in a proceeding is the spouse or close relative of a judge's commissioner, magistrate, or referee does not in itself require the judge's disqualification.