

**JUDICIAL ETHICS ADVISORY COMMITTEE
OF THE
STATE OF DELAWARE**

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February 27, 2002

JEAC 2002 – 2

**RE: Opinion from the Judicial Ethics Advisory Committee:
Participation in Family Court “On-Call” for *Ex Parte* Custody Petitions.**

Dear _____ :

You have requested an advisory opinion from the Judicial Ethics Advisory Committee (“Committee”) on whether, consistent with the Delaware Judges’ Code of Judicial Conduct, you may participate in the after hours “on-call process” and hear emergency *ex parte* petitions from the Division of Family Services (“DFS”), given your prior service as a Deputy Attorney General representing DFS and your personal friendship with the current Deputy Attorney General representing DFS in such matters.

In your letter dated December 7, 2001, you state that, prior to your appointment as a Commissioner of the Family Court, you “prosecuted custody petitions, visitation petitions, terminations of parental rights, and custody related motions” on behalf of DFS. You further inform the Committee that “one of the current Deputy Attorneys General for the Division of Family Services is a close friend of mine.” You indicate that Family Court Commissioners in New Castle County participate in an after-hours “on call process” and are required to “alternate

their availability to respond to emergency after hours calls from [DFS] for *ex parte* custody.” You therefore specifically ask the Committee if you are “required to disqualify [yourself] from participating as an on-call Judge/Commissioner regarding [DFS] requests for *ex parte* custody pursuant to Canon 3 C (1) (a), (b), and/or (c).”

The Committee’s Advice

The Committee believes that, for the reasons set forth below, your prior employment and current friendship do not disqualify you from hearing **all** *ex parte* custody requests brought by DFS. However, we believe the applicable provisions of the Delaware Judge’s Code of Judicial Conduct require that you disqualify yourself from hearing any matter regarding a parent or child who was a party or party-in-interest in any prior proceeding in which you represented or advised DFS. Finally, your friendship with a current DFS Deputy Attorney General, in and of itself, does not automatically disqualify you under Canon 3 C from hearing matters, *ex parte* or otherwise, in which he or she represents or advises DFS. However, you should remain sensitive to the requirements of Canon 2 in avoiding the appearance of impropriety, and recuse yourself if you subjectively determine that your friendship will influence your judicial conduct or judgment.

Applicable Canons of Judicial Conduct

Canons 2 A, 2 B, and 3 C (1) of the Delaware Judges’ Code of Judicial Conduct primarily apply to your stated concerns:

CANON 2. A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities.

A. A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow family, social, or other relationships to influence judicial conduct or judgment. A judge should not lend the prestige of the judicial office to advance the private interests of others; nor convey or permit others to convey the impression that they are in a special position to influence the judge. A judge should not testify voluntarily as a character witness.

CANON 3. A Judge Should Perform the Duties of the Office Impartially and Diligently

C. Disqualification.

(1) A judge should disqualify himself or herself in a 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 personal knowledge of disputed evidentiary facts concerning the proceeding;

(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 or such lawyer has been a material witness concerning it, or the judge was associated in the practice of law within the preceding year with a law firm or lawyer acting as counsel in the proceeding;

(c) The judge knows that, individually or as a fiduciary, the judge or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) 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:

(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 an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceedings.

(e) The judge has served in governmental employment and in such capacity participated as counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.

Analysis

Your letter states that “one” of the current Deputy Attorneys General representing DFS is your “close” friend. This fact, alone, does not prevent you from hearing petitions in which Deputies, other than your friend, represent DFS. No provision of Canon 3 C requires disqualification, nor does the Committee believe your impartiality might reasonably be questioned in such a situation, based upon your friendship alone. As to whether you may ethically hear petitions in which your close friend represents DFS, this Committee’s predecessor, the Judicial Proprieties Committee, issued an advisory opinion regarding a judge’s friendship with an attorney appearing before him (JPC 1992-2) which the Committee finds applicable to your query. In that matter, a judge had served as best man at a judicial colleague’s wedding, and

the colleague's wife subsequently practiced before the judge. The Committee noted that the inquiry implicated Canon 2, but recognized that "friendly relations among members of the Bench and Bar are a tradition in our State," and that "there is no mandate that judges isolate themselves from social contact with members of the Bar. This would lead to needless disqualification from pending cases to the detriment of litigants and judicial economy." *JEAC 1992-2* (citing *CM&M Group, Inc. v. Carroll*, Del. Supr., 453 A.2d 788, 795 (1982)). The Committee thus advised that Canon 2 did not require disqualification on the facts presented in that inquiry.

Your letter describes your friendship with the Deputy Attorney General as "close" without providing further detail. In a phone conversation you explained that you and the Deputy socialize frequently, and the Deputy sometimes babysits for your children. Inasmuch as the Judicial Proprieties Committee implicitly found that the friendship it had to consider did not create an appearance of impropriety, this Committee believes that a merely "close" friendship as you describe likewise does not create an *appearance* of impropriety. However, the Committee recognizes that the circumstances of a particular friendship could become so close and continuing that the parties to the friendship are commonly identified as closely associated by reasonable people who know them. Such a friendship may give rise to an objective appearance of impropriety, especially if the relationship develops other aspects, including but not limited to financial or amorous relations. You must, of course, be constantly vigilant as to whether, subjectively, your relationship with your friend influences your judicial conduct or judgment.

The Committee finds your prior representation of DFS to be of more concern. In your letter, you suggest that, even though you may have represented DFS in a prior custody action, once the custody issue at that particular point in time is resolved, any future custody action by DFS regarding the same child is a new "proceeding" and you therefore are not prohibited from hearing that new "proceeding" as a former government lawyer under Canon 3 C (1) (e). However, the Committee believes that is too narrow an application of the term "proceeding," especially as it applies to custodial matters in Family Court. In addition, we believe the broader

provision of Canon 3 C (1) (b) applies as well, which requires disqualification if the “judge served as a lawyer in the matter in controversy.” It is the Committee’s view that the “matter in controversy” is the custodial arrangement for the child or the fitness of a particular parent. Even though it may have been previously judicially determined, if litigated again it remains the same “matter in controversy.” It is our understanding that, if Family Court determines the custody of a child, subsequent petitions and motions to *modify* that custody order can be brought until the child’s majority.

The application of Canon 3 C (1) (a) to your inquiry causes the most concern. In hearing a custody matter regarding a party parent or party-in-interest child in which you previously represented or advised DFS, it is probable that you may have obtained extra-judicial information regarding the parent or child in the course of your prior representation. You may have actively litigated against a parent, seeking to terminate that parent’s custodial rights. Even if your prior experience and familiarity with a particular family, parent or child has not created a personal bias or prejudice (requiring recusal under Canon 3 C (1) (a)), nor given you extra-judicial knowledge of disputed evidentiary facts relevant to the new issue of custody, and you believe you are able to impartially hear such a matter, we believe in such situations your impartiality might reasonably be questioned, or at least create an appearance of non-impartiality. “As a matter of due process, a litigant is entitled to neutrality on the part of the presiding judge but the standards governing disqualification also require the *appearance of impartiality*.” *Los v. Los*, Del. Supr., 595 A.2d 381, 383 (1991) (emphasis added). This is of special concern in your situation, since in your prior practice you may have advocated certain opinions regarding the fitness of a parent, or the condition of a child, now at issue before you. “[E]ven if the judge believes that he has no bias, situations may arise where, actual bias aside, there is the appearance of bias sufficient to cause doubt as to the judge’s impartiality.” *Id.* at 385. The Committee believes there would be an appearance of bias sufficient to cause doubt as to your impartiality if you were to hear a custody

action against the same parent, or involving the same child, whose custody you previously sought on behalf of DFS.

Canon 3 C (1)'s requirement of disqualification is not limited to situations that fall precisely within its subsections (a) through (d). “[T]he "not limited to" language of Canon 3C suggests that the Delaware rule is inclusive, i.e., the designated instances prompting disqualification do not exhaust all situations in which a judge's impartiality might be questioned.” *Id.* at 384. Custody proceedings are not discrete and separate disputes between litigants, but can be on-going, repeatedly litigated matters that place at issue the history, qualities, condition and character of the parties involved, in an often emotionally-charged atmosphere regarding the most fundamental of rights. We therefore recommend that, rather than engage in a subjective/objective Canon 3 C (1) (a) disqualification analysis for each case, you refrain from hearing any custody matter brought by DFS *ex parte* or otherwise, against a parent/custodian or regarding a child who was a party or party-in-interest in a prior matter in which you represented or advised DFS.

We note that we give this advice specific to the unique circumstances presented by your situation, and intend that it be limited to the hearing of custody matters as described above. The Committee does not intend to advise broadly that a judge should recuse himself whenever a party appears before him whom the judge previously prosecuted or litigated against while in private practice or serving as a government lawyer. However, in child custody determinations, the presence before the judge of any party who was a party in a prior custody action the judge prosecuted on behalf of the State clearly constitutes the new proceeding, at least in part, as the same “matter in controversy,” and thus raises an appearance of impropriety.

Conclusion

The Committee believes the issues you raise apply to your hearing of all DFS matters, and not just *ex-parte* petitions by DFS. We assume that your inquiry was specific to hearing *ex parte* DFS petitions while you are “on call” because that is the only time you hear DFS petitions. On the facts you have presented, the Delaware Judges Code of Judicial Conduct does not prohibit

you from participating in your Court's after-hours "on call" procedure for judicial officers, or from hearing *ex parte* DFS petitions in general, even if DFS is represented therein by your Deputy Attorney General friend. However, the Committee believes that you should recuse yourself from any DFS matter regarding a parent or child who was a party or party-in-interest in any prior proceeding in which you represented or advised DFS, to avoid the appearance of impropriety. Given the nature of your on-call duty, it may prove impossible for you to determine, after hours, at home, and without files or records, whether or not one of the numerous matters you are asked to decide involves such a party from a prior proceeding you were involved in years ago. For that reason, you may be realistically unable to participate in the "on call" process without subjecting yourself to an inordinate risk of unknowingly creating an appearance of impropriety. That is a practical issue for you and your Court to address.

For the Committee:

Kenneth S. Clark, Jr., Judge
Judicial Ethics
Advisory Committee

KSC:wp

cc: The Honorable Myron T. Steele
Members of the Judicial Ethics Advisory Committee:
The Honorable Stephen P. Lamb, Chair
The Honorable James Vaughn
The Honorable Joseph R. Slights, III
The Honorable Barbara Crowell
The Honorable Mardi F. Pyott
The Honorable Sheila G. Blakely