

JUDICIAL ETHICS COMMITTEE

OPINION NO. 03-01

An inquiry has been presented for the Committee's review and consideration which addresses judicial disqualification pursuant to Rule 10, Canon 3(E) of the Rules of the Tennessee Supreme Court. The present request for an opinion follows previous Opinion No. 99-1. This opinion addresses the question of whether the judge, which is the subject of Opinion No. 99-1, should recuse herself in all matters in which an attorney and his law firm have pending before the judge. The attorney represented the ex-wife of the judge's current husband in a domestic relations matter. The attorney campaigned against the judge and was reported to be the author of several negative news articles about the judge.¹ This Committee previously opined as follows:

It is the opinion of the Committee that given the acrimonious nature of the litigation in which the judge's husband is involved and the prior actions of the lawyer¹ related to the election campaign, the judge should recuse herself from all cases involving the particular lawyer or his law firm. This recusal should apply when the law firm is a party, as well as when members of the law firm appear in a representative capacity.

Following issuance of opinion No. 99-1, circumstances changed in that the law firm for which judicial disqualification was directed merged with another law firm, thereby creating an association of approximately 50 attorneys. The original law firm no longer exists. The litigation involving the judge's spouse continues. The newly established firm has questioned the propriety of its members practicing before the judge in light of Ethics Committee Opinion 99-1.

Canon 3 of Rule 10 of the Tennessee Supreme Court generally provides that a judge shall perform the duties of judicial office impartially and diligently. Regarding judicial disqualification, Section E of Canon 3 provides in pertinent part as follows:

E. Disqualification.

¹Under the facts here, the of counsel relationship of the lawyer to the firm would not affect the application of Canon 3E. The relationship between the lawyer and the firm is substantial.

- (1) A judge shall 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 a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding; ...

No prior opinion of the Committee addresses the factual background presented by the inquiry at issue. By Opinion 93-6, the Committee was requested to render an opinion regarding the possible disqualification of a trial judge who had employed an attorney to represent him and his spouse in a business venture. The attorney was a member of a large law firm which engaged in extensive litigation. One specific inquiry concerned whether disqualification was required in all cases where any party was represented by one of the other members of the retained counsel's firm during the period that the attorney represented the trial judge and his spouse. This Committee opined that where a member of the retained attorney's firm appeared in the trial judge's court, the trial judge's impartiality might reasonably be questioned and therefore, the trial judge should make disclosure, on the record, as provided in the Canon.

By Opinion 91-4, the Committee was requested to review whether a trial judge would be required to recuse herself from any litigation where one of the parties was represented by a law firm which contemporaneously represented a business venture owned by the judge's spouse. The Committee opined as follows:

However, barring untoward conduct by the law firm in an attempt to influence the judge, or barring an extensive and frequent relationship between the spouse and the law firm, there would appear to be no reason why the judge should recuse him/herself merely because the spouse sometimes utilizes the services of that firm.

The facts underlying the present inquiry do not present circumstances mandating the judge's disqualification for all cases involving members of the new law firm. Other considerations, however, must be examined. The drafter's commentary respecting Rule 10, Canon 3 (E) provides in pertinent part as follows:

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.

The present focus is not simply one of actual partiality, as recusal is also warranted when a person of ordinary prudence in the judge's position, knowing all the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality, Alley v. State, 882 S.W.2d 810, (1994); State v. Cash, 867 S.W.2d 741 (1993). The test is ultimately an objective one since the appearance of bias is as injurious to the integrity of the judicial system as actual bias,[@] Davis v. Liberty Mutual Ins. Co., 38 S.W.3d 560 (2001).

Under the circumstances of this judicial request, the Committee opines that members of the original law firm who are now affiliated with the new and surviving firm and for whom the trial judge was required to be disqualified in connection with Opinion 99-1 provide a continuing basis for the judge's recusal. With regard to all other members of the new law firm who may appear before the trial judge on unrelated litigation, disqualification is not required. Instead, the trial judge should disclose on the record information that the trial judge believes the parties or lawyers might consider relevant to the question of disqualification.

For the Committee:

Chancellor Thomas R. Frierson, II

Concur:

Judge David G. Hayes
Judge Cheryl A. Blackburn
Judge James F. Russell
Judge Thomas L. Moore, Jr.