

ADVISORY COMMITTEE
ON STANDARDS OF JUDICIAL CONDUCT

OPINION NO. 5 - 2024

RE: Propriety of a circuit court judge presiding over cases where the judge's child is member of the law firms representing a party.

FACTS

A circuit court judge has two children who are attorneys in private practice in separate firms. The law firms are small to mid-sized firms and their offices are limited to South Carolina locations. Both firms have appeared before the judge before. The judge inquires if automatic disqualification is required if other members of the children's law firms appear before the judge.

CONCLUSION

A circuit court judge must generally disqualify himself/herself when the law firms employing the judge's children appear as counsel of record, but the judge can utilize the remittal procedure in Canon 3F to allow the parties to waive disqualification.

OPINION

Rule 3E(1)(d)(ii) states that “[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 the judge or the judge's spouse, or a *person within the third degree of relationship* to either of them” appears as a lawyer in the proceeding. (emphasis added). The third degree of relationship includes the children of the judge. The Commentary to that section states:

The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under Section 3E(1), or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome

of the proceeding" under Section 3E(1)(d)(iii) may require the judge's disqualification.

While the judge clearly cannot preside over any case in which one of the judge's children appears as counsel, this prohibition does not automatically apply to other members of the firm. However, Rule 3E(1)(a) also requires disqualification "in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where the judge has a personal bias or prejudice concerning a party or a party's lawyer...." Such a question could arise where other members of the law firm(s) that employ the judge's children represent a party.

In Opinion 6-2004, we considered whether a Master in Equity was automatically disqualified from presiding over matters where one of the parties was represented by a firm in which the judge's son was a practicing attorney, though not involved in the pending case. We found that the judge was not disqualified but should disclose for the record the son's employment, allow the parties to consider the question out of the judge's presence, and act upon the parties' request thereafter. ¹

We believe the logic of Opinion 6-2004 applies. However, in 2022, our Supreme Court clarified the disqualification and remittal procedure.² See, In re Barker, 436 S.C. 610, 875 S.E.2d 44 (2022). In that opinion, the Court opined that if a judge's impartiality might reasonably be questioned, the judge must disqualify himself/herself and disclose on the record all information

¹ We did note in that case that the possibility of disqualification was only necessary in contested case.

² This case may not seem very different than the language in Opinion 6-2004. In that Opinion, we stated that "Canon 3F allows a judge disqualified by the terms of Canon 3E to **instead of withdrawing**, disclose on the record the basis of his disqualification." (emphasis added). Barker makes it clear that judge must actually disqualify himself or herself, provide the reasons for such, and then allow the parties to decide whether to waive disqualification.

relevant to the question of disqualification. Id. Then, under Canon 3F, the parties can consider, out of the presence of the judge, whether to waive disqualification. Id. If the parties and lawyers, without participation by the judge, agree that the judge should not be disqualified, then the judge may participate. Id. This agreement shall be incorporated into the record. Id.

Therefore, we conclude that the judge must disqualify himself or herself (in contested cases only) when any of the children’s law firms appear as counsel and utilize the remittal procedure in Canon 3F.³ If this procedure becomes frequent, the judge may want to request that the clerk’s office avoid scheduling any cases with those firms for the judge’s terms of court.

s/ Usha Jeffries Bridges
USHA JEFFRIES BRIDGES, CHAIR

s/ William H. Seals, Jr.
WILLIAM H. SEALS, JR.

s/ Ariail E. King
ARIAIL E. KING

June 27, 2024

³ We note that this conclusion is limited to the facts presented. We recognize that we may have reached a different decision if the judge’s children were practicing in a “big-law” firm with hundreds of attorneys and offices in multiple states. However, as that question was not before us, we decline to address it at this time.