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VIA EMAIL and REGULAR U.S. MAIL

David Pepper
Ohio Democratic Party
340 Fulton St.
Columbus, Ohio 43215

RE: Opinion letter regarding judicial disqualification

Dear Mr. Pepper:

You have asked me to evaluate whether a judicial officer should recuse him or herself under the following circumstances: The judicial officer serves as an associate justice on the Supreme Court of Ohio and at the same time the justice's father serves as the Attorney General for the State of Ohio.

Qualifications

I was first licensed to practice law in Ohio in November of 1978. Since then I have practiced as a public defender, a prosecutor and in private practice in three different states: Ohio, New Hampshire, and New York. I continue to be registered as an active member of the bar in Ohio and in New York. I have been involved in matters concerning attorney ethics, attorney misconduct, judicial ethics, judicial misconduct and the unauthorized practice of law for over 18 years. From 1997 until 2013, I served as the Disciplinary Counsel of the Supreme Court of Ohio. In that role, I both prosecuted and supervised the prosecution of numerous cases of attorney misconduct and judicial misconduct as well as cases involving the unauthorized practice of law in Ohio. My experience includes presenting attorney discipline cases, judicial discipline cases and unauthorized practice of law cases to the requisite tribunals and arguing those cases before the Supreme Court of Ohio.

During my tenure as Disciplinary Counsel, I served on three separate Task Forces: the Supreme Court Task Force on the Ohio Rules of Professional Conduct (2003-2006); the Supreme Court Task Force on the Ohio Judicial Canons (2007-2009); and the Supreme Court Task Force to Review the Ohio Disciplinary Process (2009-2010). The Task Force on the Ohio Rules of Professional Conduct was responsible for the proposed revision to the Ohio disciplinary rules, which were adopted by the Supreme Court in 2007. The Task Force on the Ohio Judicial Canons was responsible for the proposed revision to the Ohio Judicial Canons, which were adopted by the Supreme Court in 2009.

I belonged to the Association of Judicial Disciplinary Counsel a national organization of judicial disciplinary authorities. I was a member of AJDC for 13 years, a board member for 6 years and president for 2 years. I was a member of the National Organization of Bar Counsel for 16 years. I am a member of the Association of Professional Responsibility Lawyers. Since 2005, I have also served as an adjunct professor teaching professional responsibility at the Moritz College of Law at the Ohio State University.

My present practice focuses on the representation of Ohio lawyers and judges in matters of professional responsibility as well as providing expert services concerning professional responsibility issues. My hourly rate for this engagement is $250.

Materials Reviewed

In addition to the assumed facts listed below, I have also reviewed the Ohio Code of Judicial Conduct, the ABA Annotated Model Code of Judicial Conduct, the Judicial Conduct Reporter as well as authorities cited or referenced in this opinion.

Assumed Facts

1. The judge in question is sitting as an associate justice on the Ohio Supreme Court;
2. The justice's father is concurrently serving as the elected Attorney General of the State of Ohio;
3. The Attorney General's Office represents entities in matters before the Supreme Court of Ohio;
4. The Attorney General's Office will, on occasion, be a party to litigation before the Supreme Court of Ohio; and,
5. The Attorney General's Office will, on occasion, prepare and file an Amicus brief in matters pending before the Supreme Court of Ohio.

Analysis

Ohio Jud. Cond. R. 2.11 sets forth the circumstances when an Ohio judge must disqualify themselves. As applicable here, Ohio Jud. Cond. R. 2.11 states:

> (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:
> (2) The judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is any of the following:

> (a) A party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;
> (b) Acting as a lawyer in the proceeding;

The rule is unambiguous that whenever a party to a proceeding before a judge is within the third degree of relationship to the judge, the judge must recuse. Here, the Attorney General is the justice's father and as such fits within the definition of one within a third degree relationship.[1] Accordingly, it is my expert opinion that in any matter where the Attorney General is a party, the justice must disqualify himself. I hold this opinion to a reasonable degree of legal certainty.

The second fact pattern involves applying the rule to the situation where the Attorney General's office is representing a party before the Supreme Court of Ohio. In this situation, the Attorney General's office will likely be represented by an Assistant Attorney General not the Attorney General himself. Nonetheless, the attorney general is normally identified as counsel for the party on every single pleading filed with the Supreme Court of Ohio. This identification of the Attorney General as counsel occurs on the first page of the pleading and again after the prayer for relief.

The issue is whether this creates a situation where the justice must disqualify himself because a member of his father's office is counsel of record for a party before the Supreme Court of Ohio. Jud. Cond. R. 2.11 does not require a showing that the justice is in fact impartial. Rather, the inquiry is whether under the circumstances, the justice's "impartiality might reasonably be questioned." Thus, the analysis looks to an objective determination of whether under the circumstances there is an appearance that the justice's impartiality might reasonably be subject to question.

Jud. Cond. R. 2.11 comment 4 indicates that simply having a lawyer from a law firm where the justice's relative works may not be a disqualifying circumstance. This would be particularly true where the related lawyer is an associate, had no involvement with the matter at hand and did not stand to benefit financially from a decision in the matter. That, however, is not the circumstance here.

In this fact pattern, as distinguished from an associate at a private law firm, the lawyer in question is the government attorney who presides over all the lawyers in the office. In other jurisdictions, a judge having a relative functioning as the supervisor of other lawyers who appear before a judicial officer has been determined to necessitate disqualification. The District of

[1] The Ohio Judicial Canons define "third degree of relationship" as including the following persons: great grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew and niece.

Columbia Advisory Committee on Judicial Conduct addressed such a situation in Advisory Opinion No. 9 (2001). In that opinion, the committee was asked by a Superior Court Judge whether she should disqualify herself from cases brought by the Office of the Chief Legal Counsel for the District (Corporation Counsel) when her husband served as the Chief Counsel. The committee noted that there was a large number of staff attorneys employed by the Corporation Counsel, but that all the attorneys operated under the direction and control of the Corporation Counsel. And those attorneys not only served under him, but they worked on cases for which the Corporation Counsel was ultimately responsible.

As the DC committee noted, the outcome of those cases impacted not only the individual attorneys working on them, but also impacted the reputation and potentially the future career of the Corporation Counsel. Further, while the staff assistants may be listed as counsel of record, the DC committee observed that the Corporation Counsel's name appears on all filings and, as Corporation Counsel, the judge's husband had ultimate responsibility for the direction and control of the staff assistants appearing before the judge. Accordingly, the advisory opinion did not find the number of assistants or the layers of supervisory personnel a distinguishing factor.

In the Federal system, the judiciary is guided by the "Guide to Judiciary Policy." That policy includes a series of advisory opinions on various ethical issues for judges. Advisory Opinion No. 38, discusses the obligation to recuse if a federal judge is related to an attorney acting as a lawyer in a proceeding before the judge. The opinion first notes that service as an Assistant US Attorney is distinguishable from service as an attorney in a private law firm. This is because:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

Berger, v. United States, 295 U.S. 78, 88 (1934).

Opinion No. 38 addressed the situation of a judge presiding over a case where the lawyer for the government worked in an office where the judge's relative was the United States Attorney or the Acting United States Attorney. The opinion is clear: "If the relative serves as either the United States Attorney or Acting United States Attorney, the judge should recuse in all cases in which the office appears."

In New York Advisory Opinion 10-5 (2010), the New York committee reached the same conclusion with regard to a judge whose spouse was the County Attorney. There, the committee required the judge to recuse him/herself in all cases involving the County Attorney's office. The recusal was necessary because the judge's relative, as the County Attorney, was involved either directly or indirectly in all cases which the County Attorney appears.

And finally, in Advisory Opinion 08-1 (2009), the Maine Judicial Ethics Committee addressed the situation of a judge presiding over cases in which the Maine Attorney General's office appeared and the judge's wife's sister was the Attorney General. The opinion acknowledges that while it is rare that the Attorney General would appear personally, there are many cases where the Attorney General is involved in decisions relating to cases and that it is to expected that the Attorney General would ordinarily direct or approve major decisions made by his or her staff. Even in routine cases where the Attorney General might not have an involvement, unanticipated events could easily lead to the Attorney General's involvement. As a result, the committee expressed the view that "the Attorney General is acting a lawyer in all cases where the Attorney General is personally involved in directing or approving decisions by her staff." And in those situations, recusal is required.[2]

In the assumed facts here, the justice's relative is the elected Attorney General for the State of Ohio. As such, he has ultimate responsibility for all the legal matters handled by his office and he has ultimate responsibility for all the attorneys working for him. In fact, according the Revised Code, the Attorney General "shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested." R.C. 109.02. And the Attorney General can be called upon by either the Governor or the General Assembly to appear for the state in any court in a matter where the state is a party or has an interest. In each occasion, the Attorney General, whether personally appearing or not, is answerable for the actions of his office.

Because of the supervisory nature of the Attorney General over all the attorneys in his office, the likelihood that the Attorney General would be at least aware of if not directly involved with cases before the Supreme Court of Ohio, the accountability of the Attorney General for the actions of his staff, and his ultimate responsibility for all the cases handled by his staff, it is my expert opinion that under Jud. Cond. R. 2.11, the justice in the assumed facts would be required to recuse from all cases where a member of the Attorney General's office was appearing as

[2] The relevant Code provisions in New York, the District of Columbia, Maine as well as the Federal Code of Judicial Conduct are virtually identical to Ohio Jud. Cond. R. 2.11 (A) (2) (b).

counsel or was filing an Amicus brief. I hold this opinion to a reasonable degree of legal certainty. I reserve the right to supplement my opinions upon receipt of additional information.

Sincerely yours,

Jonathan E. Coughlan