Current Canons are Canon 3E(1) and Canon 3E(1)(d)(ii).

JUDICIAL ETHICS OPINION JE-8

Formal

Question: If a judge's son is an assistant Commonwealth's attorney, must the judge disqualify himself in all criminal cases or only those cases in which his son participates?

Answer: He should (if possible) disqualify in those cases in which his son is involved, but it is not necessary to disqualify himself in other criminal cases.

References: SCR 4.300, Canon 3C(1) and 3C (1) (d).

OPINION: (July 1980)

Canon 3C(1) provides in part:

> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
>
> (d) He or his spouse, or a person within the third degree of relationship to either of them . . . .
>
> (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.

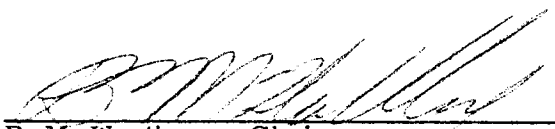
Addressing first the question whether the judge must disqualify himself in all criminal cases because of his son's affiliation with the Commonwealth's Attorney, we are in agreement with the American Bar Association Commentary to Canon 3C(1)(d) which states:

> The fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not of itself disqualify the judge.

Moreover, the Commonwealth's Attorney's office is not a law firm and it is not "substantially affected" by the outcome of the proceeding, for the Commonwealth's Attorney does not represent clients nor does he have a financial interest in the outcome of the litigation. The distinction between a prosecutor and an attorney in a civil action is well stated in Berger v. United States, 295 U.S. 78 at 88 (1934). Although made in a different context, it is relevant here. The Court points out that the prosecutor is "the representative not of an ordinary party to a controversy, but of a sovereignty . . . . whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done."

In view of this basic distinction between civil and criminal litigation, we think that the judge's impartiality cannot "reasonably be questioned" because of his son's affiliation with the Commonwealth's Attorney.

Turning now to the question of disqualification in those cases in which the judge's son actually participates, the better practice would indicate that the judge disqualify. As a practical matter, however, there are many circuits and districts where there is but one judge on the bench and one lawyer in the prosecutor's office. If that lawyer happens to be the son or daughter or other close relative of the judge, a mandatory disqualification would result in the judge being disqualified in all criminal cases. This would work a hardship, not only on the other judges in the region who would be called upon to sit for the disqualified judge, but also on the defendants. It would become difficult to guarantee the speedy trial to which defendants are entitled if a substitute judge had to be found in all criminal cases. For that reason, we take the position that disqualification is not an absolute requirement in criminal cases where there is a close relationship between the judge and the prosecutor. However, in those districts and circuits which have more than one judge, the dockets can and should be arranged so that the relative does not have to appear before the judge to whom he is related.



B. M. Westberry, Chairman
Ethics Committee of the Kentucky Judiciary