

August 25, 2008

The Honorable Charles E. Clawson, Jr.
Circuit Judge-Third Division
20th Judicial District
801 Locust Street
Courthouse-Second Floor
Conway, Arkansas 72034

Re: Advisory Opinion No. 2008-07

Dear Judge Clawson:

In your request for an advisory opinion you state that you preside over the Third Division Circuit Court for the 20th Judicial District and that your current responsibilities are to preside over one-half of the criminal docket throughout the District consisting of Faulkner, Van Buren and Searcy Counties. You have advised that effective August 1 the Prosecuting Attorney has appointed your son, Charles E. Clawson, III as a Deputy Prosecuting Attorney for your District to prosecute criminal cases in the First Division; that he will not be assigned to represent the State on any matters that will appear before you and that he would not have any association with the criminal load in the Third Division. You stated that you and the other Circuit Judges in your district would like the counsel of our Committee.

You have no control over the selection by the Prosecuting Attorney of his deputies. The question therefore arises as to whether you should disqualify yourself from hearing all cases handled by the office of Prosecuting Attorney on the basis that your son is a deputy.

Canon 3 E (1) provides that A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. Subsection (c) requires disqualification if a judges child "has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding." Subsection (d) (ii) requires disqualification if a person within the third degree of relationship to the judge is acting as a lawyer in the proceeding. In the comments under this subsection it is stated: "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 and 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."

Were we in a perfect world it could be argued that a judge of thirteen years should recuse always in cases where a law firm or a governmental office such as that of the Prosecuting Attorney has employed his son who bears his exact name. It could be argued that the judge's impartiality might reasonably be questioned; that the son has an economic interest in the success of that office; and that he is employed by the firm or office acting as a lawyer in the proceeding. We do not live in such a world. In fact, we live in a state with a small population of attorneys who must serve as judges, prosecutors and attorneys.

In our Advisory Opinion No. 94-08 we stated, "Judges need to consider seriously the issues concerning disqualification but they also have an obligation to be available to handle the caseload before them." We are of the opinion that, absent other compelling circumstances, you are not required to disqualify in all cases that come before you which are handled by the office of the Prosecuting Attorney. You are required to recuse whenever your son appears in front of you, or by written materials, if your impartiality might reasonably be questioned. Such disqualification is waivable under Canon 3 (F).

Very truly yours,

Edwin Alderson
For the Committee