S T A T E O F T E N N E S S E E
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Opinion No. 07-123

Judicial Commissioner Closely Related to Law Enforcement Officer

QUESTION

Is it a conflict of interest for a person to serve as a judicial commissioner in the same county in which that person's son, daughter, or other close relative is a law enforcement officer?

OPINION

No statute prohibits a person whose son, daughter, or other close relative is a law enforcement officer in the same county from serving as a judicial commissioner. A judicial commissioner is a "judge" subject to the Code of Judicial Conduct. The Code requires a judge to disqualify himself or herself in some proceedings involving a close relative. The Judicial Ethics Committee is authorized to issue opinions interpreting the Code. In addition, in some circumstances, a judicial commissioner with such a relationship may not be a "neutral and detached" magistrate as required by the Fourth Amendment to the United States Constitution. For this reason, if possible, a judicial commissioner should recuse himself or herself when presented with a request for a search warrant by the commissioner's close relative or in connection with an investigation in which the commissioner's relative is an investigating officer.

ANALYSIS

This opinion addresses possible conflicts of interest for a judicial commissioner. We assume the request refers to judicial commissioners in Giles County. Judicial commissioners are generally appointed under Tenn. Code Ann. § 40-1-111. Under Tenn. Code Ann. § 40-1-111(a)(1)(A), the chief legislative body of any county with a population of less than 200,000 may appoint one or more judicial commissioners. Duties of commissioners appointed under this statute are as follows:

> (i) Issuance of search warrants and felony arrest warrants upon a finding of probable cause and pursuant to requests from on-duty law enforcement officers and in accordance with the procedures outlined in chapters 5 and 6 of this title;
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> (ii) Issuance of mittimus following compliance with procedures prescribed by § 40-5-103;
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> (iii) The appointing of attorneys for indigent defendants in accordance with

> applicable law and guidelines established by the presiding general sessions judge of the county;
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> (iv) The setting and approving of bonds and the release on recognizance of defendants in accordance with applicable law and guidelines established by the presiding general sessions judge of the county; and
>
> (v) Issuance of injunctions and other appropriate orders as designated by the general sessions judges in cases of alleged domestic violence.

The question is whether it is a conflict of interest for a person to serve as a judicial commissioner in the same county in which that person's son, daughter, or other close relative is a law enforcement officer. No statute prohibits an individual with a son, daughter, or other close relative who is a law enforcement officer from serving as a judicial commissioner. Tenn. Code Ann. § 12-4-101 generally prohibits an official from being directly interested in an agreement that the official has the power to supervise or the duty to vote for. In this case, the possible conflict comes from a family relationship, not from a contract. Tenn. Code Ann. § 12-4-101, therefore, does not apply to this case. No other statute of general applicability or private act applicable to Giles County appears to forbid an individual with close relatives in law enforcement from serving as a judicial commissioner. The county ethics policy adopted under Tenn. Code Ann. §§ 8-17-101, *et seq.*, should also be consulted to determine whether it affects this arrangement.

The inquiry, however, does not end with applicable statutes. A judicial commissioner is a "judge" subject to the Code of Judicial Conduct. *See* Tenn. R. Sup. Ct. 10, Application of the Code of Judicial Conduct, Part A. These rules include a duty to avoid the appearance of impropriety, Tenn. R. Sup. Ct. 10, Canon 2.B., and the duty to disqualify one's self from making a judgment involving the interests of a close relative in some circumstances. Tenn. R. Sup. Ct. 10, Canon 3.E. The Judicial Ethics Committee is authorized to issue formal advice regarding the Code of Judicial Conduct. Tenn. R. Sup. Ct. 10A.

In addition to these considerations, we note that the statutory duties of judicial commissioners include issuing search and felony arrest warrants upon a finding of probable cause and pursuant to requests from on-duty law enforcement officers. Tenn. Code Ann. § 40-1-111(a)(1)(A)(i). A party who determines probable cause must be neutral and detached and capable of determining whether probable cause exists. *State v. Bush,* 626 S.W.2d 470, 473 (Tenn. Crim. App. 1981) (citing *Shadwick v. City of Tampa,* 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed.2d 783 (1972)). In *Shadwick,* the United States Supreme Court noted that "[t]his Court long has insisted that inferences of probable cause be drawn by a 'neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'" 92 S.Ct. at 2123 (quoting *Johnson v. United States,* 333 U.S. 10, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948)). Based on this authority, this Office has concluded that the requirement of neutrality and detachment extends to prohibiting those who are actively engaged in law enforcement and those who have potential division of loyalty problems from making probable cause determinations. Op. Tenn. Att'y Gen. 02-109 (October 2, 2002) (a constable with law enforcement powers may not serve as a judicial

commissioner because an individual with a position in law enforcement is not a "neutral and detached" magistrate); Op. Tenn. Att'y Gen. 97-135 (September 30, 1997) (a security officer at a state university campus is not a "neutral and detached" magistrate); *see also* Op. Tenn. Att'y Gen. 00-88 (May 5, 2000) (a police department dispatcher, who is not a sworn police officer, is not "neutral and detached" as required by state and federal law); Op. Tenn. Att'y Gen. 92-16 (February 25, 1992) (a county jailer would not be a "neutral and detached" magistrate who could serve as a judicial commissioner); Op. Tenn. Att'y Gen. 90-07 (January 17, 1990) (a full-time deputy sheriff whose duties are restricted to civil process is not a "neutral and detached" magistrate).

In this case, the individual is not a law enforcement officer but is closely related to one or more law enforcement officers. We have found no case stating that the existence of such a relationship, by itself, prevents an individual from being a "neutral and detached" magistrate as required by law. *See, e.g., United States v. McKeever*, 906 F.2d 129 (5th Cir. 1990), *cert. denied*, 498 U.S. 1070, 111 S.Ct. 790, 112 L.Ed.2d 852 (1991) (warrant issued by a magistrate whose spouse was a reserve deputy with the sheriff's department, where there was no indication that the magistrate's spouse was present when the warrant was issued or that the spouse participated in the search); *Mitchell v. State*, 931 So.2d 639 (Miss. Ct. App. 2006), *rehearing denied* (2006) (warrant issued by judge whose son was the sheriff's department's only investigator); *Clark v. State*, 456 S.E.2d 672 (Ga. Ct. App. 1995), *cert. denied* (Ga. 1995) (warrant issued by magistrate who was a mother of a police officer in the same police department as the affiant supplying the basis for the warrant). But circumstances including a familial relationship may require the commissioner to recuse himself or herself rather than issue the warrant. *Commonwealth of Pennsylvania v. Sharp*, 683 A.2d 1219 (Pa. 1996) (a magistrate who was the spouse of an investigating officer in a case should have recused herself when presented with a search warrant relative to the investigation; but, based on all the other facts and circumstances, including the difficulty of finding an on-duty magistrate and the fact that the spouse was not the affiant, the relationship did not make the search warrant defective). For this reason, if possible, a judicial commissioner should recuse himself or herself when presented with a request for a search warrant by the commissioner's close relative, or in connection with an investigation in which the commissioner's relative is an investigating officer.

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