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Dr. Dennis Golden  
105 Cottage Road  
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**ISSUE: WHETHER A SITTING JUDGE WOULD BE DISQUALIFIED OR RECUSED IF THE JUDGE'S SPOUSE WAS THE COUNTY'S SHERIFF.**

Dear Sir:

I have been asked to comment on this issue and am not involved in the local politics of Panola County. I have great regard for the people and leaders of Panola County and trust them to make wise decisions on those whom they elect to serve.

I am a criminal defense attorney who defends cases all over the state. I appear in both State and Federal Courts and am licensed to practice law in all courts of Texas. I hold degrees from the University of Texas at Austin and South Texas College of Law Houston. Additionally, for information only, I am a Past President of the Texas Criminal Defense Lawyers Association, a member of the National Association of Criminal Defense Attorneys, on the faculty of the Texas Criminal Trial College, the faculty of the Capital Trial Advocacy Program at the Center for American and International Law. I am a Super Fellow of the Texas Lawyers Education Institute. I have lectured on criminal defense issues and professional ethics at numerous professional seminars.

I have represented thousands of individuals charged with crimes. I have tried to verdicts over 250 jury trials. I recently finished defending my 62nd capital murder case last Thursday evening in the 369<sup>th</sup> District Court of Cherokee County. During my 40-years of criminal defense, I do not recall ever having a case where the elected sheriff has testified.

However, as it appears that the issue presented is novel, it should be contemplated in light of existing law, prevailing rules of procedure, and professional ethics.

In evaluating a recusal, several factors must be weighed. If a Judge is disqualified, then recusal is automatic. However, if they are otherwise qualified, then recusal is discretionary. If recusal is discretionary instead of automatic, three legal directives or guidelines govern the recusal decision.

1. **Article 5, Section 1 of the Texas Constitution** provides that a judge shall not sit in a case in which the judge may be interested or where either party may be connected with the judge, either by blood or marriage, within the 3<sup>rd</sup> degree or when the judge has been a lawyer.

A keyword in this analysis is “party” or “parties.” A party in a civil lawsuit is who filed the suit or the one charged with a crime in a criminal case. Criminal cases are brought in the name of the State of Texas. The state is the party, and the one charged with a crime is the party. Neither individual law enforcement officers nor any officer of the law is a “party” in cases they have investigated or filed. While they may be called to testify, they do not, in so doing, become parties.

In my opinion, the fact that a judge and a county sheriff are married to each other does not disqualify the judge, under the Constitution, from sitting on a case in which the investigation was conducted by, or the witnesses are employed by, the Sheriff’s Department.

2. Another provision that applies to the disqualification of judges is **Article 30.05 of the Texas Code of Criminal Procedure**, which states, *“No judge or justice of the peace shall sit in any case where he may be the party injured, or where he has been counsel for the State or the accused, or where the accused or the party injured may be connected with him by consanguinity or affinity within the third degree ...”* This article basically restates the constitutional provision and adds a little clarity such as, instead of using the word “interest,” uses the term “injured party.”

Again, in my opinion, merely being the county’s sheriff does not make that person an interested or injured party or a party of any kind to a criminal case. Should the sheriff be the victim of a crime such as an assault, the judge would be disqualified, being the spouse of an injured party.

3. The last rule addressing disqualification or recusal of judges is **Rule 18b, Texas Rules of Civil Procedure**. Much like its counterpart in the criminal rules, this rule requires disqualification if the judge has served as a previous lawyer, has an interest (more than just curiosity or as a citizen), or is related to a party within the prohibited degree.

In civil cases, a judge is subject to recusal if the judge’s impartiality might be questioned; has a personal bias or prejudice; personally knows of disputed facts, or is a material witness. Further, recusal is proper if, while in government service, the judge participated in the litigation or has a financial interest in the case. Recusal is appropriate if the judge or spouse is an officer, director or trustee of a party in the suit. If the judge is substantially affected financially; or is likely to be a material witness or has been an involved lawyer, then recusal should be the remedy.

Generally, it has been rare for an elected sheriff to testify in a case. There might be an occasion where a sheriff could be a material witness and called upon to testify. In that circumstance, the judge should properly be recused, being the sheriff’s spouse.

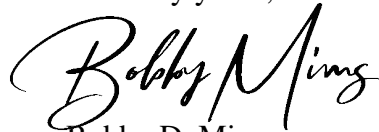
In my opinion, the circumstances, as I understand them, do not give rise to the risk of disqualification of the judge married to the elected sheriff except in very narrow circumstances. Any such event can quickly be addressed by referencing the above legal principles and statutes.

I understand that in Panola County, the County Court at Law and the 123<sup>rd</sup> Judicial District Court have concurrent jurisdiction. If one judge or the other must step aside, the other court’s

judge can preside over the case. Such an arrangement would cause little additional cost to the county.

I trust this will assist you in understanding a reasonable interpretation of the law that would apply in the rare event that concerns you. Thank you for the opportunity to address this interesting question.

Sincerely yours,



Bobby D. Mims

BDM/ns