

ADVISORY COMMITTEE
ON STANDARDS OF JUDICIAL CONDUCT

OPINION NO. 1 - 2021

RE: Propriety of a part-time municipal judge presiding over hearing in which an attorney that the judge consulted or hired is appearing.

FACTS

A Part-time municipal judge is also a member of a limited liability company. That company may need to hire an attorney to resolve issues regarding potentially negligent work of a contractor. The judge seeks an opinion on the following:

1. Must a judge recuse himself/herself from hearing a matter involving an attorney that the judge has consulted, but not hired?
2. Must a judge recuse himself/herself from hearing a matter involving an attorney the judge has hired?
3. If a judge recuses himself/herself from a matter involving an attorney that the judge has hired, at what point, if ever, is the judge no longer required to recuse himself/herself?
4. If a judge's period of recusal does expire, and the attorney consulted or hired later appears before the judge, must the judge disclose the relationship?

CONCLUSION

1. A judge does not need to recuse himself/herself from hearing a matter involving an attorney with whom the judge has merely consulted.
2. A judge should recuse himself/herself from hearing a matter involving an attorney that is currently representing the judge.

3. After representation of the judge has ceased, and all financial obligations are satisfied, a judge is not required to recuse himself/herself permanently from matters involving that attorney, but should recuse himself/herself for a period of time.
4. If the judge feels that his or her impartiality may be questioned even after representation has ended, the judge should disclose an attorney's prior representation of the judge in matters in which that attorney appears.

OPINION

Canon 3E(1) states that a judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. With regard to the questions presented, judge's mere consultation with an attorney should not give rise to any reasonable question of impartiality and no disqualification or disclosure is required.

The remaining questions, or similar ones, have been the subject of two prior opinions: Opinion 3-1983 and 2-1990. In 3-1983, we found that a probate judge's impartiality could be easily questioned were he to allow an attorney representing his personal interests in another court to come before him in Probate Court. We advised the judge to either recuse himself or to disclose on the record the basis for disqualification, and if all parties agreed¹ that the judge's relationship was immaterial, the judge could preside.

In 2-1990, this Committee addressed the propriety of a judge hearing cases in which one of the lawyers represented the judge in a matter two years prior. The matter had been settled and there was no other relationship between the judge and the lawyer. We cited various provisions of

¹ Under Canon 3F, the agreement of the parties to waive disqualification should also be on the record after the parties and attorneys have had time to consult without the presence of the judge.

the Code and noted:

These sections in no way disqualify a judge from presiding over a proceeding in which one lawyer may have represented him in the past provided in his mind he can hear the matter fairly and impartially and render a proper decision. Members of the judiciary cannot live their lives in vacuum. They and members of their families are from time to time involved in unfortunate circumstances and dealings which may bring them personally to court as litigants. A judge should be entitled to competent representation in his legal affairs. If a lawyer is to be barred from ever again appearing before a judge he may have represented in a legal matter, the lawyer whom the judge selects to represent him, or provide legal services, would most likely decline such representation. On the other hand, the judge should not be required to select some less competent, less experienced or inept attorney who might take his case but has never or will never appear before him. As a judge, most attorneys with trial experience will appear before him, and the more able will probably appear quite often. A past representation on a strictly business basis without ongoing financial involvement should not disqualify either the judge or the attorney from future participation in a court trial before the judge.

Opinion 2-1990. We concluded that there was no financial or other interest between the judge and the attorney and there was no reason to suspect impartiality simply due to past representation.

Using these cases as guidance, we conclude that a judge should recuse himself/herself in matters in which one of the attorneys is also currently representing the judge on a personal business matter.

Whether a judge must recuse himself/herself or disclose the relationship on the record after the representation ends (and the length of time recusal or disclosure is required) is a more difficult question. In our Op. 2-1990, the representation had taken 2 years prior and the Committee found that disqualification was not required. We did not opine as to whether another time period would also suffice.

At least one other state has suggested a "reasonable period of time...perhaps two years" for recusal but also suggested it could extend beyond that time:

Following this period, the judge need only continue recusal if he or she personally

harbors a doubt as to his or her ability to act impartially in the matter. The judge shall consider all relevant factors to determine if recusal is appropriate, including but not limited to the nature of the instant proceeding, the nature of the prior representation as well as its frequency and duration, the length of time since the last representation, the amount of work done for the attorney by the judge and the amount of fee, whether the representation was routine or technical or involved the morality of the client-attorney's conduct, whether there exists a social relationship between the attorney and justice, and whether there are any special circumstances creating a likely appearance of impropriety.

NY Jud. Adv. Op. 89-13, 1989 WL 572109.

However, other states have indicated something more or less than two years might apply. Alabama's Judicial Inquiry Commission has stated that the reasons for disqualification cease to exist after the end of the representation and that no recusal or disclosure is then required. Ala. JIC Op. 94-516. However, the JIC also stated that recusal or disclosure may extend past that date if there are "extraordinary circumstances." While those circumstances are not detailed, in Alabama JIC Opinion 92-442, the Committee found that the judge should be disqualified for two years after representation ended.

In North Carolina, the Judicial Standards Commission determined that while legal representation is ongoing, and for a reasonable period of time after the conclusion of the representation (a minimum of six months)² a judge must disclose the relationship and disqualify himself/herself upon the request of either party or follow the remittal of disqualification procedure. North Carolina Judicial Ethics Formal Advisory Opinion: 2011-02,

² The six-month period was based on Formal Advisory Opinion 2009-02, in which the Commission adopted "a 'Six Month Rule' whereby newly installed judges, for a minimum of 6 months after taking judicial office, refrain from presiding over any adjudicatory proceeding wherein an attorney associated with the judge's prior employer provides legal representation to a party in the proceeding." North Carolina Judicial Ethics Formal Advisory Opinion: 2011-02, 2011 WL 5084795, at *2.

2011 WL 5084795. However, the N.C. Commission also noted that the duties of the judge after the six-month period varied:

While disqualification will usually not be required following the end of the six month period following conclusion of the relationship, the particular circumstances of the representation may necessitate continued disqualification. As stated by the Colorado Judicial Ethics Advisory Board, "The judge first should consult his or her own emotions and conscience to determine freedom from disabling prejudice. The judge also should consider whether an objective, disinterested person aware of all the circumstances would reasonably question the judge's partiality because of the past representation. Among the circumstances the judge should take into consideration are the length of time he or she was represented by the attorney, the nature and extent of the representation (e.g., was the subject of the representation a simple transactional matter or did it involve protracted litigation), the amount of money paid to the attorney, and how much time has elapsed since the representation."

Id. (internal citations omitted).

In Op. 1995-02, 1995 WL 350906, the Illinois Judicial Ethics Committee stated that the ethical rules did not specify a length of time for disqualification after representation by an attorney, but noted that the state's rules imposed a three-year bar where the judge was associated in the private practice of law with any law firm or lawyer currently representing a party in controversy and a seven-year bar where a judge previously represented a litigant. However, the committee did not suggest that either of these terms would necessarily apply:

It might be easy to select the three-year or seven-year standard and argue that such a period would serve as a "safe harbor" for any judge who has previously been in a lawyer-client relationship with a lawyer representing a litigant, but to do so would be a disservice. One can analogize different types of representation to these differing standards. For example, representation of the judge on a ticket for exceeding the speed limit or at a closing on the purchase of a home may well be de minimis such that that lawyer could appear from the judge immediately following termination of the representation. In contrast, the lawyer representing the judge in the judge's dissolution of marriage involves a more extensive lawyer-client relationship where the three-year standard might be appropriate. The Committee could identify no specific examples which the fact that a lawyer represented a judge might justify disqualification for seven years as any possible question as to the

judge's impartiality relates under that provision to the litigant and not to the lawyer representing the litigant. To do so may make it unreasonably difficult for a judge to obtain legal representation.

Id.

Thus, while it might be safe to for this Committee to opine that, in light of our Opinion in 2-1990, a two-year term of recusal is always appropriate, the term could be more or less and the judge should use his or her discretion, as we explained in 3-1983:

By way of guidance to other members of the bench, while we cannot say that a judge should always disqualify himself when his personal attorney comes before his court, we would caution that this is a very difficult and delicate question. While, in some cases, this decision may be left primarily to the good judgment and conscience of the judge, we would direct the judge that in making this determination he should adhere to the letter and spirit of the Code and this opinion. Should the judge feel his hearing the case would give rise to his impartiality being reasonably questioned then, unless the parties otherwise agree after disclosure, the judge should disqualify himself.

Op. 3-1983. Thus, as other states have noted, there may not be a bright line term, but the judge must use his or "good judgment and conscience." Furthermore, as the North Carolina and Illinois opinions state, the judge must consider the length and scope of the representation; the results obtained; the length of time since the representation ended; and other factors that might give rise to questions of impartiality.

s/ Letitia H. Verdin
LETITIA H. VERDIN, CHAIR

s/ Usha Jeffries Bridges
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s/ Keith M. Babcock
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January 5, 2021