

ADVISORY COMMITTEE
ON STANDARDS OF JUDICIAL CONDUCT

OPINION NO. 11 - 2020

RE: Propriety of a newly-appointed Municipal Judge, who was formerly a prosecutor for the City, presiding over cases involving City prosecutors.

FACTS

A City prosecutor has been appointed Municipal Judge for the same City in which the judge previously served as prosecutor. The judge inquires as to which cases would require recusal or disqualification, such as cases involving other City prosecutors.

CONCLUSION

A Municipal Judge who formerly served as a City prosecutor may preside over cases involving other City prosecutors, provided that the judge did not serve as attorney in the matter in controversy.

OPINION

The Committee has addressed a very similar issue in in Opinion 13-1995. In that case, a newly-elected administrative law judge inquired into the propriety of presiding over cases involving the Department of Revenue where the judge had been previously employed by that State agency. We determined that an administrative judge need not automatically recuse himself from a proceeding in which a former governmental agency employer appears unless the judge has served as a lawyer in the matter in controversy.

In Opinion 13-1995, we cited Canon 3C(1)¹ of the Code of Judicial Conduct, which stated

¹ This section is now contained in Canon 3E of the current rules.

that "[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where: ...(b) he served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law, served during such association as a lawyer concerning the matter. ..." The Commentary to the 1995 rule stated that:

A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection; a judge formerly employed by a governmental agency; however; [sic] should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association. The test under this section is whether a reasonable person would find the appearance of impartiality. *Rice v. McKenzie*, 581 F.2d 1114 (4th Cir. 1978); *SCA Services v. Morgan*, 557 F.2d 110 (7th Cir. 1979).

Based on that section, we found that the administrative law judge could preside over cases presented by the Department of Revenue except where the judge served directly as a lawyer in the matter in controversy. Subsection (b) required the judge to recuse himself where the judge served as a lawyer to the case because a judge would have prior knowledge of the facts and a preconceived bias towards the ultimate outcome stemming from his or her previous employment, thus requiring disqualification. However, where an employee of the same agency appeared before the judge, no disqualification was required because the Code does not assume the direct association between lawyers at the same governmental agency as it does between lawyers at the same law firm.

The rules were substantially revised after Opinion 13-1995. However, under the current version of the Code, Canon 3E(1)(b) still requires disqualification where a judge served as a lawyer in the controversy. The commentary to Canon 3E(1) states:

A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Section 3E(1)(b); a judge formerly employed by a government agency, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.

We find that the reasoning and conclusion in Opinion 13-1995 apply here. Thus, the Municipal Judge may preside over cases involving City prosecutors. Disqualification is only required where the judge served as a lawyer in the matter in controversy or if the judge's impartiality might reasonably be questioned. Where disqualification is required due to the judge's service as lawyer in the matter in controversy, remittal or waiver of the disqualification is not appropriate. Where disqualification might be appropriate due to a question of the judge's impartiality, the remittal procedure in Canon 3F may be utilized to allow the parties to waive disqualification.

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

s/ Usha Jeffries Bridges
USHA JEFFRIES BRIDGES

s/ Keith M. Babcock
KEITH M. BABCOCK

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