

Arizona Supreme Court
Judicial Ethics Advisory Committee

OPINION 22-01
(Issued May 20, 2022)

**DISQUALIFICATION CONSIDERATIONS WHEN PURSUING
POST-JUDICIAL EMPLOYMENT**

ISSUE

A judge has sought a formal written ethics opinion that sets forth the ethical parameters for active full-time judicial officers who are seeking public or private employment immediately following their resignation or retirement from the bench. The committee's staff director has also fielded numerous requests for informal ethics advice on this subject over the past few years, thus further suggesting the need for a formal written opinion.

ANSWER

A judge who chooses to apply for and/or negotiate for post-judicial employment must recuse from any matter in which the prospective employer appears before the judge. In the event that the negotiations do not result in employment, the judge should continue to recuse for a reasonable period of time.

DISCUSSION

I. Applicable Code Provisions

Several provisions of the Arizona Code of Judicial Conduct ("Code") are relevant to this inquiry, including:

RULE 1.2. Promoting Confidence in the Judiciary

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

RULE 2.1. Giving Precedence to Judicial Duties

The judicial duties of a judge take precedence over all of a judge's other activities.

RULE 2.11. Disqualification

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

...

(C) A judge subject to disqualification under this rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

RULE 3.1. Extrajudicial Activities in General

A judge may engage in extrajudicial activities, except as prohibited by law or this code. However, when engaging in extrajudicial activities, a judge shall not:

...

(B) participate in activities that will lead to frequent disqualification of the judge;

II. Analysis

Of the provisions cited above, Rule 2.11 governing disqualification is the most relevant, with the requirement that a judge shall disqualify "in any proceeding in which the judge's impartiality might reasonably be questioned." Canon 3(E) of the 1993 version of the Arizona Code of Judicial Conduct also contained this language. One of the comments to Canon 3(E) noted, "For example, if a judge were in the process of

negotiating for employment with a law firm, the judge would be disqualified from any matters in which that law firm appeared, unless the disqualification was waived by the parties after disclosure by the judge.” When Arizona adopted its version of the 2007 Model Code of Judicial Conduct, this language did not carry forward into the comments for Rule 2.11, however, the committee agrees the reasoning of the comment is still applicable under the current Code.

In a prior opinion, this committee opined that a judge is required to screen his or her law clerk from cases involving a law firm, public agency, or other entity with whom the clerk obtains future employment once an offer has been accepted. *See* Advisory Opinion No. 01-02 (December 31, 2001). That opinion also held that under certain circumstances, judges must disqualify themselves when a law clerk receives and accepts a job offer from a law firm, public agency, or other entity with matters pending before the judge. *Id.* The opinion noted:

. . . after a law clerk accepts a job offer from a law firm, public agency, or other entity with matters pending or impending before the judge, disqualification is required unless the clerk is screened from any substantive work and discussion in such matters, or unless the parties and counsel waive the apparent conflict pursuant to Canon 3F. A party would likely question the judge’s impartiality upon learning of the clerk’s continued work on a case after having accepted a job offer from an adverse party or its legal representative. Even if a reasonable person would not necessarily question the judge’s impartiality in such circumstances, the judge should disqualify himself or herself in the absence of the screening or waiver discussed above.

The rationale behind the need for disqualification in those circumstances is the appearance of partiality. *See Matter of Haddad*, 128 Ariz. 490, 627 P.2d 221 (1981) (judge is required not only to be impartial, but to be seen as impartial). Thus, if a law clerk must be screened and disclosure made, it is even more imperative that judges abide equally stringent requirements.

Other jurisdictions have similarly concluded that a judge should disqualify on any matter involving a future or prospective employer. *See, e.g.*, Rule 3.17(B), New Jersey Code of Judicial Conduct (Judges shall disqualify themselves if the judge has initiated contact about or discussed or negotiated his or her post-retirement employment with any party, attorney or law firm involved in any matter pending before the judge in which the judge is participating personally and substantially); Alaska Advisory Opinion 1999-1 (After a judge has accepted an offer of employment with any party, witness, attorney, government entity, or law firm directly involved in litigation, the judge should recuse

and disclose the basis for the recusal); Illinois Advisory Opinion 2007-1 (A judge should disqualify himself from any matter in which a firm with which the judge has negotiated post-judicial employment appears, even if the negotiations have been preliminary and were made through an agent); Michigan Advisory Opinion JI-35 (1991) (A judge shall not negotiate for employment with any person who is involved as a party or as a lawyer for a party in a matter in which the judge is participating personally and substantially, and, where negotiations for employment have begun and a matter involving the prospective employer or in which the negotiating entity appears is assigned to the judge, the judge should automatically recuse herself or himself); New York Advisory Opinion 2005-35 /2010-78 Revised and Consolidated (December 8, 2011) (A judge who has had informal meetings with members of a law firm concerning post-retirement employment must disqualify herself, subject to remittal, when the law firm appears before her as long as the firm remains a potential employer even before there is an offer or discussion of compensation); South Carolina Advisory Opinion 6-1998 (Judge should disqualify himself or herself from matters involving the firm or company which will employ the judge upon his retirement); U.S. Advisory Opinion 84 (2009) (After the initiation of any discussions with a law firm, no matter how preliminary or tentative the exploration may be, the judge should recuse on any matter in which the firm appears).

The committee believes that the appearance of partiality or the appearance of impropriety attaches at the initial stages of negotiating post-judicial employment. Once a judicial officer approaches or engages with a prospective employer and begins negotiation for future employment, that judicial officer must recuse from any and all matters involving that future employer – be it a law firm, governmental agency, or other entity. Such an approach is consistent with Arizona State Bar Opinion 89-01, which held that an attorney employed as a hearing officer may not negotiate employment with a law firm that has matters pending before her. *See also* E.R. 1.12, Arizona Rules of Professional Conduct (A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral).

Other jurisdictions have opined that remittal of the disqualification issue is appropriate. *See, e.g.*, Alaska Advisory Opinion 1999-1; New York Advisory Opinion 2005-35 /2010-78 Revised and Consolidated; New York Advisory Opinion 2017-27; U.S. Advisory Opinion 84 (2009). Rule 2.11(C) of the Code permits a disqualification issue to be disclosed to and waived by the parties, except in those instances of bias or prejudice. However, the committee is not in favor of such remittal under these circumstances, as it places undue pressure on the parties or their counsel to waive the conflict. Instead, the onus is on the judge to disqualify and step away from the matter.

The committee also reminds judges that their judicial duties take precedence under Rule 2.1 of the Code. A judge seeking post-judicial employment should exercise

caution and refrain from employment negotiations if such negotiations would lead to frequent disqualification by the judge. *See* Rule 3.1(B). For example, if a judge is assigned a criminal calendar, negotiations with the local prosecuting agency would clearly lead to frequent disqualifications. The safest course of action in those types of circumstances is to wait until after leaving the bench to seek employment.

Finally, the committee recognizes that there will be instances in which negotiations occur, but do not ultimately result in the judge either being offered or accepting employment. When negotiations end in such a result, the disqualification considerations do not immediately dissipate. Like our counterparts in Michigan, the committee believes that if a judge does not join a particular firm / agency / entity following employment discussions, the judge should for a reasonable time disclose to all parties the proposed professional relationship, and recuse unless asked to proceed. "'Reasonable time' should be determined after weighing factors such as the length of time the negotiations have been in progress, the notoriety of the negotiations, and whether the break in negotiations was amicable." *See* Michigan Advisory Opinion JI-35 (1991). *See also* New York Advisory Opinion 2005-35 /2010-78 Revised and Consolidated (December 8, 2011) (Whether disqualification is warranted after employment negotiations do not result in employment will depend on the specific circumstances of the negotiations. For example, if the judge develops a personal bias or prejudice about the firm, or if the judge's impartiality might reasonably be questioned under the particular circumstances presented, then the judge must disqualify him/herself when the law firm appears in the judge's court).

CONCLUSION

While the most cautious approach may be for a judge to wait until after leaving the bench to negotiate future employment, the committee recognizes that approach may not be practical or feasible for all judicial officers. For those judicial officers that seek post-judicial employment while still serving on the bench, the Code requires that they refrain from an appearance of partiality or an appearance of impropriety. Thus, they must disqualify from any matter in which the prospective employer appears before them. In the event that the negotiations do not result in employment, the judge should continue to recuse for a reasonable period of time