

Committee on Codes of Conduct Advisory Opinion No. 70

Disqualification When Former Judge Appears as Counsel

This opinion addresses recusal considerations when former judges, including judges who resign pursuant to 28 U.S.C. § 371(a), appear as counsel before the court in which they once held judicial office. It does not directly address the ethical obligations of the former judge who later appears as counsel, although these obligations may be relevant to whether the former judge or his or her law firm should be disqualified from representation. Those obligations are governed by the rules of professional responsibility applicable to attorneys in the relevant jurisdiction. See, e.g., Rule 1.12, ABA Model Rules of Professional Conduct (“ABA Rule 1.12”).

The Code of Conduct for United States Judges and 28 U.S.C. § 455(a) require recusal when the impartiality of a judge might reasonably be questioned. The Code also directs recusal where an appearance of impropriety might exist. These principles govern the duties of the judge when a former colleague appears as counsel. See Canon 2A and Canon 3B(3). Although the Committee on Codes of Conduct is not authorized to render advisory opinions interpreting the recusal statutes, Canon 3C of the Code closely tracks the language of 28 U.S. C. § 455, and the Committee is authorized to provide advice regarding the application of the Code.

The Committee recommends that courts announce a policy that for a fixed period after the retirement or resignation of a colleague, judges recuse themselves in any case in which the former colleague appears as counsel. The Committee’s experience suggests that a recusal period of one to two years would be appropriate, depending on the size of the bench and the degree and nature of interactions among the judges. The advantage of such a policy is that it is evenhanded, can be cited as supplying an objective basis for recusal, and may be formulated without respect to particular individuals. Advance adoption of a policy also gives fair notice of the practice restrictions a judge will face after resignation or retirement.

Even though a fixed period may have expired, a judge may be required to recuse in a case in which counsel for a party is a former judge with whom the sitting judge had a particularly close association. The standard applied here is the same as when a former associate or partner in a law firm, or a close friend, is an attorney in the case. The relevant considerations are set forth in [Advisory Opinion No. 11 \(“Disqualification Where Long-Time Friend or Friend’s Law Firm Is Counsel”\)](#). We have suggested a two-fold test. First, does the judge feel capable of disregarding the relationship; second, can others reasonably be expected to believe the relationship is disregarded? In applying that test, the judge should consider the closeness of the relationship, the length of service together, the size of the bench, and the period that has elapsed since the former judge left the bench.

In a large court, personal or social associations may not have been close. If the former judge had been a colleague for a short time, it may be easier to disregard the past relationship, and more likely that litigants will feel the relationship will play no part in the decision. When the association between the sitting and former judge has been long, close, and continuing, the judge's impartiality might reasonably be questioned, and the judge should consider recusal.

A discrete problem arises when a former judge appears as counsel in a case that was filed in his or her former court before he or she resigned. In such circumstances, the presiding judge should confirm that the attorney's representation is not in violation of the applicable rules of professional responsibility. Although the rules of some jurisdictions may allow waiver of conflicts resulting from an attorney's prior judicial service, the Committee concludes that waiver would not be appropriate to allow a former federal judge to represent parties in any case that had been assigned to the former judge's individual docket during his or her judicial tenure. See generally ABA Rule 1.12(a) ("[A] lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge . . . unless all parties to the proceeding give informed consent, confirmed in writing."). Appropriate steps may include review of the docket sheet to insure the case was not previously assigned to the attorney during his or her judicial service or inquiry of the parties.

If the principles stated here are followed, the Committee finds no objection to appearances by former judges. That the former colleague may have superior knowledge of the viewpoints of the sitting judges does not require disqualification. The same information is available from a thorough study of the sitting judge's opinions, or from observation of the judge in the courtroom. Lawyers who frequently litigate before a particular judge may acquire the same type of information, yet no one would suggest recusal or disqualification in such cases.

If a judge sits in a case in which a former colleague appears as counsel, care should be exercised in the courtroom to avoid using or permitting indications of familiarity. The former colleague should not use or be called by his or her former title. See [Advisory Opinion No. 72 \("Use of Title 'Judge' by Former Judges"\)](#). First names and references to past association, events, or discussions should be avoided.

Absent special circumstances giving rise to reasonable questions regarding the impartiality of the sitting judge, the fact that a former judge is an associate or partner of the law firm appearing in the case, where the former judge does not appear or work on the case, does not of itself require recusal of the judge. [Advisory Opinion No. 11](#), pertaining to the law firm of a close friend, sets forth the considerations here. The judge should, however, be alert to concerns relating to disqualification of the firm which, like disqualification of the former judge, is governed by the relevant jurisdiction's rules of professional responsibility. See, e.g., ABA Rule 1.12(c) ("If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly

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undertake or continue representation in the matter unless: (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and (2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.”).

June 2009