

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

41 SOUTH HIGH STREET-SUITE 3370, COLUMBUS, OH 43215-6105
(614) 644-5800 FAX: (614) 644-5804

OFFICE OF SECRETARY

OPINION 91-20

Issued August 16, 1991

[Former CJC Opinion-provides advice under the former Ohio Code of Judicial Conduct which is superseded by the Ohio Code of Judicial Conduct, eff. 3/1/2009.]

[Not Current- subsequent rule amendments to Canons 1 through 6, Ohio Code of Judicial Conduct, eff. May 1, 1997]

SYLLABUS: A part-time referee should disqualify him/herself in a proceeding in which a party is represented by an attorney with whom the part-time referee co-counsels on unrelated cases in private practice when a co-counsel case is ongoing or when a co-counsel case has been completed and the fees have been fully earned but not received. Similarly, a part-time referee should disqualify him/herself in a proceeding in which a party is represented by a law partner or associate of an attorney with whom the part-time referee co-counsels on unrelated cases in private practice when a co-counsel case is ongoing or when a co-counsel case has been completed and the fees have been fully earned but not received. In these situations a referee's impartiality might reasonably be questioned under the Code of Judicial Conduct Canon 3C(1) general standard of disqualification. Canon 3D does provide a procedure for remittal of disqualification, but only for disqualification by reason of Canon 3C(1) (c) economic interest or Canon 3C(1) (d) family relationship. There is no procedure for remittal based on disqualification under the Canon 3C(1) general standard of whether impartiality might reasonably be questioned.

OPINION: This opinion addresses disqualification of a part-time referee in proceedings in which a party is represented by an attorney with whom the referee co-counsels on unrelated cases in private practice. Three questions are presented:

1. Whether a part-time referee should disqualify him/herself in a proceeding in which a party is represented by an attorney with whom the part-time referee co-counsels on unrelated cases in private practice;
2. Whether a part-time referee should disqualify him/herself in a proceeding in which a party is represented by a law partner, associate, or an attorney who shares offices with the attorney with whom the part-time referee co-counsels on unrelated cases in private practice;

3. Whether a part-time referee disqualified from proceedings described above may remit the disqualification.

Question 1

Part-time referees must comply with certain provisions of the Code of Judicial Conduct (Judicial Code). See Code of Judicial Conduct Compliance Section. One such provision is Canon 3 which sets forth rules regarding disqualification. The general standard of disqualification in Canon 3C(1) is that "[a] judge [or referee] should disqualify himself [herself] in a proceeding in which his [her] impartiality might reasonably be questioned." Code of Judicial Conduct Canon 3C(1). Four specific instances in which a judge's or referee's impartiality might reasonably be questioned, are identified in Canon 3C(1) (a) through (d). However, none of the specific instances are directly applicable to analysis of the questions presented. Thus, the issue of disqualification in this opinion will be governed by applying the Canon 3C(1) general standard.

Impartial judges and referees are fundamental to a legal system which provides equal justice under the law. In applying the general standard of disqualification, the legal profession and the public rely on judges and referees to apply common sense standards of fairness and to be sensitive to both the letter and the spirit of rules insuring a fair tribunal. The public's perception of impartiality is a measure of whether a judge or referee should disqualify him/herself. "Any conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's 'impartiality might reasonably be questioned' is a basis for the judge's disqualification." E. Thode, Reporter's Notes to Code of Judicial Conduct 60 (1973). However, as previously stated by the Board, "no bright line separates practice arrangements which do and do not create conflicts requiring judicial disqualification." Ohio Sup.Ct. Op. 91-8 (1991).

Previously, this Board advised that under Section A (2) of the Compliance Section of the Judicial Code, a part-time judge, his/her law partners and associates may not practice in the court on which the part-time judge serves or any court subject to the appellate jurisdiction of the court on which he/she serves. Ohio Sup.Ct. Op. 87-22 (1987). In a subsequent

opinion the Board advised that a county court judge could not hear cases in which his/her law partner or associate appear as counsel and that law partners, associates, shareholders in a legal professional association, employees, subcontractors, or independent contractors could not practice law before a judge affiliated with their law practice. Ohio Sup.Ct, 87-29 (1987). The Board has also advised that a part-time referee may not hear cases in which any member of his/her law firm represents one of the parties because the referee's impartiality might reasonably be questioned under Canon 3C(1). Ohio Sup.Ct, Op. 87-036 (1987).

When attorneys co-counsel on cases and divide fees in accordance with DR-2-107, even though they are not partners or associates in a firm, there is a professional relationship which could give an appearance of impartiality if one of the attorneys appears before the other in his/her role as referee, particularly in instances when a co-counsel case is ongoing or in a completed co-counsel case where the fees have been fully earned but have not been received. Potential conflicts abound because of the personal, professional, and financial aspects of the relationship. Therefore, it is the opinion of this Board that under Canon 3C(1) a part-time referee should disqualify him/herself in a proceeding in which a party is represented by an attorney with whom the part-time referee co-counsels on cases in private practice when a co-counsel case is ongoing or when a co-counsel case has been completed and the fees have been fully earned but not received.

Question 2

Similarly, disqualification of a part-time referee would be required in a proceeding in which a party is represented by a law partner or associate of an attorney with whom the part-time referee co-counsels on unrelated cases in private practice when a co-counsel case is ongoing or when a co-counsel case has been completed and fees have been fully earned but not received. However, the application of this advice would not necessarily extend to require disqualification of the referee when an attorney, who merely shares office space with the attorney who co-counsels with the referee, appears before the referee provided that the attorneys who share office space do not have access to confidences and secrets through each other's files and there is no involvement, relationship, or responsibility with regard to the case being co-counseled.

Question 3

Canon 3D of the Judicial Code provides a procedure for remittal of disqualification, but only for disqualification by reason of Canon 3C (1) (c) economic interest or Canon 3C (1) (d) family relationship. E. Thode, Reporter's Notes to Code of Judicial Conduct 71 (1973). There is no procedure for remittal based on disqualification under the Canon 3C(1) general standard of whether impartiality might reasonably be questioned. In the above situations a referee's impartiality might reasonably be questioned under the Canon 3C(1) general standard of disqualification and thus, there would be no procedure for remittal of disqualification.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.