

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 95-3

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Withdrawn by Adv. 2021-06

[Former CJC Opinion-provides advice under the former Ohio Code of Judicial Conduct which is superseded by the Ohio Code of Judicial Conduct, eff. 3/1/2009.]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 newly elected judge should disqualify himself or herself from hearing cases advocated by a former law partner, when the judge is receiving income collected from accounts receivable of the former law partnership.

There is no specific time period after wind-up of a law partnership in which a judge would be prohibited from hearing cases advocated by a former law partner.

Law firm partners and a newly elected judge should not continue their law partnership even for the sole purpose of receiving income collected from accounts receivable.

OPINION: This opinion addresses questions regarding a newly elected judge's transition from the practice of law to the bench.

1. May a newly elected judge hear cases advocated by a former law partner, when the judge is receiving income collected from accounts receivable of the former law partnership?
2. Is there a specific period of time after wind-up of a law partnership in which a judge would be prohibited from hearing cases advocated by a former law partner?
3. May law firm partners and a newly elected judge continue their law partnership for the sole purpose of receiving income collected from accounts receivable?

Question One

May a newly elected judge hear cases advocated by a former law partner, when the judge is receiving income collected from accounts receivable of the former law partnership?

The transition period for newly elected judges requires a metamorphosis from practicing law as an attorney to becoming a judicial officer prohibited from practicing law. See Ohio Code of Judicial Conduct, Canon 5F ("Full-time Judges, including those persons designated as Judges in the Compliance section of this Code, should not practice law.") Often times, a newly elected judge assumes the bench before all of his or her legal fees can be collected.

Around the country the consensus is that a judge may receive earnings from a former firm, but may not hear cases advocated by the law firm when the judge has a financial relationship with the law firm. See e.g., Virginia State Bar, LEO-368 (1980) (a firm's attorneys cannot practice before the judge, when the law firm and the judge have a fee-sharing arrangement); Alabama, Judicial Inquiry Commission, Op. 86-248(1986) (a judge will not try any cases involving a member of the former firm when the judge receives fees from that partnership for work completed on or before assuming the bench); Philadelphia Bar Ass'n, Op. 88-28A (1989) (a judge must recuse from cases involving the judge's former firm when the judge is receiving, pursuant to the partnership agreement, a percentage interest of the fees and costs paid to the partnership); Michigan State Bar, Informal Op. CI-399 (1979) (a judge may not hear cases in which a member of the firm must make payments to the judge for stock in the firm previously owned by the judge, or where the firm must make payments to the judge relating to resignation from the firm, accounts receivable, and work in progress); Louisiana SupCt, Comm. on Judicial Ethics, Op. 12 (1973) (a judge should recuse when former law firm members represent a party if the judge has any financial interest in the firm).

Other views do exist. A few states take the approach of prohibiting lawyers in a firm from appearing before a former partner. See e.g., New Jersey Sup. Ct, Advisory Comm. on Professional Ethics, Op. 592 (1986); Pennsylvania Bar Ass'n, Op. 92-173 (1992). Another state advises that a lawyer may handle a matter before a judge who was a former partner, without disclosing the judge's financial interest in another case currently handled by the firm. See Virginia State Bar, Op. 1023 (1988).

In this Board's view, permitting a judge to receive earnings from a former firm, but requiring that judge to recuse from cases advocated by the law firm when the judge has a financial relationship with the law firm is both a practical and an ethical approach. To prohibit a judge from reaping the benefit of his or her legal work, would have a chilling effect upon the number of qualified practitioners who would forego private practice for judicial office.

Recusal avoids the appearance of impropriety that would occur if a law firm financially indebted to a judge appeared before that judge. Recusal is consistent with the ethical requirements of Canon 3C(1) of the Ohio Code of Judicial Conduct that "[a] judge should disqualify himself [herself] in a proceeding in which his [her] impartiality might reasonably be questioned." Under some circumstances recusal might be

required under Canon 3C (l) (c). Canon 3C (l) (c) provides that a judge should disqualify himself or herself in instances where the judge has "any other interest that could be substantially affect[ed] by the outcome of the proceeding." Thus, under Canon 3C (l) (c), recusal would be required when a judge's financial relationship with a law firm advocating a case would be substantially affected by the outcome of the case.

In conclusion, to avoid the appearance of partiality and to maintain the public's confidence in the administration of justice, recusal is necessary when a judge has a financial relationship with a law firm that is advocating a case before the judge. Thus, this Board advises that under Canon 3C (l) of the Ohio Code of Judicial Conduct, a newly elected judge should disqualify himself or herself from hearing cases advocated by a former law partner, when the judge is receiving income collected from accounts receivable of the former law partnership. As a caveat, payments to a judge from accounts receivable may include payments for work performed or in progress prior to assuming the bench, but should not be interpreted as an approval for a judge and a law firm to maintain a financial relationship ad infinitum.

Question Two

Is there a specific time period after wind-up of a law partnership in which a judge would be prohibited from hearing cases advocated by a former law partner?

The Ohio Code of Judicial Conduct does not establish a time period calling for a judge's recusal from hearing a case advocated by a former law partner. Iowa has advised regarding a time frame for recusal. See Iowa State Bar Ass'n, Ops. 89-21 (1989) (setting a two year period in which a lawyer may not appear before a judge who is a former firm member or associate, but granting some exceptions for routine administrative judicial matters and circumstances of extreme hardship to clients) and Iowa State Bar Ass'n, Op. 89-50 (1990) (setting a one year period in which an assistant county attorney may appear before a judge who is a former firm member).

This Board does not feel compelled to set an arbitrary time period, since the Code provides other guidance. As addressed in Question One, under Canon 3C (l), a newly elected judge should recuse from hearing cases advocated by a former law partner, when the judge is collecting accounts receivable from the former partnership. Canon 3C (l) (b), set forth below, also provides guidance-- a judge should recuse from a case when a former law partner who served during such association as a

lawyer in the matter is now appearing before the judge in the matter, or when the judge or lawyer has been a material witness concerning the matter.

Canon 3C(1) A judge should disqualify himself [herself] in a proceeding in which his or her impartiality might reasonably be questioned, including but not limited to instances where: (b) he [she] served as a lawyer in the matter in controversy, **or a lawyer with whom he [she] previously practiced law served during such association as a lawyer concerning the matter**, or the judge or such lawyer has been a material witness concerning it; (Emphasis added).

In addition, there are other circumstances that may call into question a judge's impartiality when a former law partner appears before that judge; for example, the closeness of the relationship between the judge and the former partner, and or the time interval since the professional relationship ceased. However, such fact specific determinations must be made by the judge, not imagined by the Board.

Nevertheless, it is the Board's view that automatic disqualification of a judge from presiding in a case in which a former law partner appears as an attorney is not required. This view is not unique. See e.g., ABA Standing Comm. on Ethics and Professional Responsibility, Informal Op. 87-1524 (1987) ("The committee is of the opinion that the judge is not disqualified from trials in which the judge's former associate participates as counsel solely as a result of their prior association in the same law firm.")

In conclusion, this Board advises that there is no specific time period after wind-up of a law partnership in which a judge would be prohibited from hearing cases advocated by a former law partner. Canon 3C (1) and 3C (1) (b) provide guidelines to assist the judge in making the determination of when recusal is required. Under Canon 3C (1) a newly elected judge should recuse from hearing cases advocated by a former law partner, when the judge is collecting accounts receivable from the former partnership. Under Canon 3C (1) (b)--a judge should recuse from a case when a former law partner who served during such association as a lawyer in the matter is now appearing before the judge in the matter. Other circumstances would warrant recusal under Canon 3C (1) whenever the judge determines that impartiality might reasonably be questioned. In general, an appearance of partiality would fade the more time passes from the wind-up of the partnership to the time of the hearing before a judge who is a former partner of a lawyer advocating a case.

Question Three

May law firm partners and a newly elected judge continue their law partnership for the sole purposes of receiving income collected from accounts receivable?

In the past this Board has expressed the view that "judges who maintain any interest in their former law practice, no matter how it is structured, would be creating the appearance of impropriety." Ohio SupCt, Bd of Comm'rs on Grievances and Discipline, Op. 89-17 (1989). As to the question raised, in addition to the concern regarding impropriety under Canon 2, there are other rules to consider.

Under Canon 5F of the Code of Judicial Conduct a full-time judge should not practice law. Under DR 2-102 (B) of the Code of Professional Responsibility, "[a] lawyer who assumes a judicial, legislative, or public executive or administrative post or office shall not permit his [her] name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which he [she] is not actively and regularly practicing law as a member of the firm, and during such period other members of the firm shall not use his [her] name in the firm name or in professional notices of the firm." See Ohio SupCt, Bd of Comm'rs on Grievances and Discipline, Op. 87-048 (1987) ("A judge shall not permit his [her] name to be used on his [her] former law firm's letterhead, professional notices or included in the firm's name.")

To permit a judge to continue a law partnership, even for the sole purpose of collecting accounts receivable, is inconsistent with all the above rules--Canon 2 and Canon 5F of the Code of Judicial Conduct and DR 2-102 (B) of the Code of Professional Responsibility. Thus, in answer to Question Three, the Board advises that law firm partners and a newly elected judge should not continue their law partnership even for the sole purpose of receiving income collected from accounts receivable. The Board's view is consistent with its past advice in Opinions 89-17 (1989) and 87-48 (1987) cited above.

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.