

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

OPINION 2007-2

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Withdrawn by Adv.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[Former CJC Opinion-provides advice under the former Ohio Code of Judicial Conduct which is superseded by the Ohio Code of Judicial Conduct, eff. 3/1/2009.]

Syllabus: A new judge is not restricted by the Ohio Code of Judicial Conduct or the Ohio Rules of Professional Conduct from receiving accounts receivable from his or her former law firm for legal services provided by the judge prior to assuming judicial office, but during this time the judge must disqualify from cases in which the former firm is counsel for a party. In hourly rate matters, the judge would be entitled to receive the accounts receivable reflecting the number of hours billed by the judge times the agreed upon hourly rate. In flat fee matters, the judge would be entitled to receive the accounts receivable for the agreed upon flat fee. In a contingent fee matter that is completed before the judge is sworn into office, the judge would be entitled to receive the accounts receivable for the agreed upon contingent fee rate in the fee agreement. In a contingent fee matter that is not completed before the judge is sworn into office, the most prudent approach is for the judge to accept compensation, once the contingency occurs, based upon quantum meruit for the services performed prior to assuming judicial office.

A new judge is not restricted by the Ohio Code of Judicial Conduct or the Ohio Rules of Professional Conduct from receiving retirement benefits from his or her former law firm pursuant to a law firm agreement. For example, pursuant to a retirement agreement, a judge may receive a percentage of the legal fees earned by other attorneys in the firm for providing legal services to the judge's clients while the judge was with the firm and during an agreed upon number of years after the judge's departure from the law firm. During the time the judge receives retirement benefits from his or her former law firm, the judge must disqualify from cases in which the former firm is counsel for a party. The time period for receiving retirement benefits should be reasonable in order to minimize the number of cases in which the judge will be disqualified. A judge and a former law firm should not maintain a financial relationship ad infinitum.

Pursuant to Canon 2(D)(3)(a), if a judge receives payments from his or her former law firm of accounts receivable for legal services provided by the judge prior to assuming judicial office and or receives payments of retirement benefits from his or her former law firm pursuant to the law firm agreement, the judge must list the former law firm as a source of income on the annual financial

disclosure statement. Such payments are not required to be reported on the Quasi-Judicial or Extra-Judicial Activity Compensation Report.

Opinion: This opinion addresses questions regarding a judge receiving compensation from a former law firm for accounts receivable and retirement benefits.

1. Is it proper for a new judge to receive accounts receivable from his or her former law firm for legal services provided by the judge prior to taking the bench?
2. Is it proper for a new judge to receive retirement benefits from his or her former law firm pursuant to the law firm's partnership agreement through which the judge is paid a percentage of the legal fees earned by other attorneys in the firm for providing legal services to the judge's clients while the judge was with the law firm and during an agreed upon number of years following the judge's departure from the law firm?
3. Must a judge report payments received from a former law firm on the Financial Disclosure Statement and the Quasi-Judicial or Extra-Judicial Activity Compensation Report?

Question 1

The Ohio Code of Judicial Conduct and the Ohio Rules of Professional Conduct do not provide direct guidance regarding a judge's compensation from his or her former law firm during the judge's transition from law firm practice to judicial service. Advice as to the questions raised require a construction of the rules.

Newly elected or appointed full-time judges must relinquish the practice of law upon assuming judicial office. Canon 4(F) prohibits a full-time judge from the practice of law, with narrow exceptions for *pro se* actions and for uncompensated legal advice, document drafting or revisions for members of the judge's family. [Pursuant to the Compliance Section of the Code of Judicial Conduct, part-time judges are not subject to Canon 4(F)].

Canon 4(F)

A judge shall not practice law. Notwithstanding this prohibition, a judge may act *pro se* and, without compensation, may give legal advice to and draft or revise documents for a member of the judge's family.

Terminology

“Member of the judge’s family” denotes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship.

Newly elected or appointed judges are not expected or required to forego compensation for legal services they provided before assuming judicial office. No rule in either the Code of Judicial Conduct or the Rules of Professional Conduct can be construed to require such forfeiture of legal fees earned prior to taking the bench.

Often the compensation due to the judge will be straightforward, such as when the legal services were provided pursuant to an hourly fee or flat fee agreement. In hourly rate matters, the judge would be entitled to receive the accounts receivable reflecting the number of hours billed by the judge times the agreed upon hourly rate. In flat fee matters, the judge would be entitled to receive the accounts receivable for the agreed upon flat fee.

But sometimes, the compensation due to the judge is less clear, such as in contingent fee matters that are not completed before the judge assumes judicial office. If the contingent fee matter is completed before the judge is sworn into office, the judge would be entitled to receive the accounts receivable for the agreed upon contingent fee rate in the fee agreement. But if the contingent fee matter is not completed before the judge is sworn into office, there is no clarity as to how the judge is to be compensated. Is the judge entitled to compensation based upon the agreed upon contingent fee rate or is the judge entitled to compensation based on quantum meruit? Is the judge entitled to compensation before the contingency occurs or must the contingency occur?

Questions regarding compensation to judges pursuant to contingent fee agreements in matters that are not completed before being sworn into office raise both legal and ethical issues. The legal issues are outside the advisory authority of this Board. The Board must limit its advice in this opinion to the Ohio Code of Judicial Conduct and the Ohio Rules of Professional Conduct. See Gov.Bar R. V § (2) (C).

The Board’s guidance from an ethical standpoint is as follows. The most prudent approach in a contingent fee matter that is not completed before the judge takes the bench is for the judge to accept compensation, once the contingency occurs, based upon quantum meruit for services performed prior to assuming judicial office. In some circumstances, such as when the contingency fee matter was nearly completed before taking judicial office, the quantum meruit compensation might equal the agreed upon percentage rate in the contingency fee contract. In other circumstances, such as when the contingency fee matter was undertaken shortly prior to taking the bench and little work was performed by the judge on

the matter, the quantum meruit would most certainly not approach the agreed upon contingent fee. A trial court considers the totality of the circumstances involved in a situation when called upon to determine quantum meruit. *Reid, Johnson, Downes, Andrachik & Webster v. Lansberry* (1994), 68 Ohio St.3d 570, 576-77.

This approach avoids any ethical concern that a judge remains involved in or responsible for legal services occurring after he or she assumes judicial office and is no longer permitted to engage in the practice of law. The approach of waiting until the contingency occurs, is in synchrony with the court's holding that a discharged lawyer is to be compensated in a contingency fee matter on the basis of quantum meruit, but is not entitled to compensation unless and until the contingency occurs. *Reid, Johnson, Downes, Andrachik & Webster v. Lansberry* (1994), 68 Ohio St.3d 570, 573-75.

A judge who is receiving payments from a former law firm of accounts receivable for legal services provided prior to assuming judicial office is required to disqualify from cases in which the former firm is counsel for a party. Canon 3(E)(1) states "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Further, Canon 3(E)(1)(c) requires disqualification when a judge "has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than a *de minimis* interest that could be substantially affected by the proceeding." Canon 3(E)(1) will always be implicated when a judge is receiving payments from a former firm. Such payments would cause a reasonable person to question the judge's impartiality. Canon 3(E)(1)(c) may or may not be implicated depending upon particular facts and circumstances that might exist.

In Opinion 95-3, the Board advised that "[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." Ohio SupCt., Board of Commissioners on Grievances and Discipline, Op. 95-3 (1995).

As stated in Opinion 95-3:

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 requirement of Canon 3(C)(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 3(C)(1)(c). Canon 3(C)(1)(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 3(C)(1)(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.

[Through amendments to Canon 3(C), effective May 1, 1997, Canon 3(C)(1) became Canon 3(E)(1) with a modification in Canon 3(E)(1) that a judge "shall disqualify" rather than "should disqualify." Canon 3(C)(1)(c) became Canon 3(E)(1)(c) with several modifications one being that "any other interest that could be substantially affect[ed] by the outcome of the proceeding" became "any other more than a *de minimis* interest that could be substantially affected by the proceeding."]

Pursuant to Canon 3(F), there is a procedure for remittal of disqualification. Remittal is appropriate only for a disqualification based other than on personal bias or prejudice. The decision to remit disqualification of a judge must be made independently by the parties and lawyers outside the presence of the judge.

Canon 3(F) Remittal of Disqualification

If, following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, joint request that the judge should remit his or her disqualification, the judge may approve and participate in the proceeding. The request and approval shall be incorporated in the record of the proceeding.

Remittal of disqualification, in most circumstances, will not be appropriate when a judge is receiving money from a former law firm. Canon 3(E)(1)(a) requires disqualification where "[t]he judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding." It is likely that a reasonable person would believe that a judge who is receiving payments from his or her former firm will have a personal bias for the former firm. Albeit, there may be occasional instances where a judge is due only an insignificant amount and the parties may decide independently that there should be a remittal of the judge's disqualification.

In conclusion to Question 1, the Board advises as follows. A new judge is not restricted by the Ohio Code of Judicial Conduct or the Ohio Rules of Professional Conduct from receiving accounts receivable from his or her former law firm for legal services provided by the judge prior to assuming judicial office, but during this time the judge must disqualify from cases in which the former firm is counsel for a party. In hourly rate matters, the judge would be entitled to receive the accounts receivable reflecting the number of hours billed by the judge times the agreed upon hourly rate. In flat fee matters, the judge would be entitled to receive the accounts receivable for the agreed upon flat fee. In a contingent fee matter that is completed before the judge is sworn into office, the judge would be

entitled to receive the accounts receivable for the agreed upon contingent fee rate in the fee agreement. In a contingent fee matter that is not completed before the judge is sworn into office, the most prudent approach is for the judge to accept compensation, once the contingency occurs, based upon quantum meruit for the services performed prior to assuming judicial office.

Question 2

According to the request before the board, a partner who leaves the law firm to assume the bench is considered under the law firm agreement to be a retiring partner subject to retirement benefits. Pursuant to the law firm agreement, the judge would receive a percentage of the fees earned on legal services provided by other attorneys in the firm to the judge's clients while the judge was with the law firm and during an agreed upon number of years after the judge's departure from the law firm.

There is nothing in the Ohio Code of Judicial Conduct or the Ohio Rules of Professional Conduct that restrain the conferring of such an agreed upon retirement benefit upon a partner who leaves a law firm to assume judicial duties.

Rule 5.6(a) of the Ohio Rules of Professional Conduct recognizes that law firms and lawyers are permitted to enter into agreements regarding the benefits to be conferred upon retirement.

Rule 5.6

A lawyer shall not participate in offering or making either of the following:

- (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, **except an agreement concerning benefits upon retirement.** [Emphasis added].
- (b) [Omitted.]

Disqualification of the judge who receives retirement benefits from a former firm is required by Canon 3(E)(1). See discussion of disqualification and recusal in Question 1.

A consequence of extending the time during which a judge receives payments from the law firm for legal services provided by attorneys in the firm to the judge's former client is that the time during which a judge is required to disqualify from cases in which the former firm represents a party will likely be longer in duration. A judge and a former firm should not maintain a financial relationship ad

indefinitum. See Ohio Sup.Ct, Board of Commissioners on Grievances and Discipline, Op. 95-3: "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." Further, Canon 2(C)(1)(b) requires that a judge not engage in continuing business relationships with lawyers or others persons likely to come before the court on which the judge serves. And, Canon 2(C)(4) requires that a judge manage his or her financial interests to minimize the number of cases in which the judge is disqualified.

In conclusion, the Board's advice is as follows. A new judge is not restricted by the Ohio Code of Judicial Conduct or the Ohio Rules of Professional Conduct from receiving retirement benefits from his or her former law firm pursuant to a law firm agreement. For example, pursuant to a retirement agreement, a judge may receive a percentage of the legal fees earned by other attorneys in the firm for providing legal services to the judge's clients while the judge was with the firm and during an agreed upon number of years after the judge's departure from the law firm. During the time the judge receives retirement benefits from his or her former law firm, the judge must disqualify from cases in which the former firm is counsel for a party. The time period for receiving retirement benefits should be reasonable in order to minimize the number of cases in which the judge will be disqualified. A judge and a former law firm should not maintain a financial relationship ad infinitum.

Question 3

Canon 2(D) of the Ohio Code of Judicial Conduct permits a judge to receive compensation for activities permitted by the Code.

As advised above, the Code does not restrict a judge from receiving payments for accounts receivable from his or her former law firm for legal services provided by the judge prior to assuming judicial office or from receiving retirement benefits from his or her former law firm pursuant to the law firm agreement.

Two public reporting requirements are set forth in the Ohio Code of Judicial Conduct. Canon 2(D)(3)(a) states the requirement for filing a financial disclosure statement as required by R.C. 102.02. Canon 2(D)(3)(b) establishes the requirement for filing a quasi-judicial or extra-judicial activity report.

Canon 2(D)(3)(a) Public Reports. A judge shall file annually the disclosure statement required by section 102.02 of the Revised Code with the secretary of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio.

Canon 2(D)(3)(b) A judge shall also file annually a report of any quasi-judicial or extra-judicial activity for which the judge received

compensation. This report shall include the date, place, and nature of any quasi-judicial or extra-judicial activity for which the judge received compensation, the name of the payer, and the amount of compensation received. The report shall be file with the Board by the fifteenth day of April of each year on forms provided by the Board.

Pursuant to Canon 2(D)(3)(a), a newly elected judge, who is receiving payments of accounts receivable or payment of retirement benefits from his or her former law firm, must list the former law firm as a source of income on the financial disclosure statement. Such payments do not need to be reported on the Quasi-Judicial or Extra-Judicial Activity Compensation Report because the payments arise from the judge's practice of law prior to assuming judicial office, not from quasi-judicial or extra-judicial activity while on the bench.

The Board's advice is as follows. Pursuant to Canon 2(D)(3)(a), if a judge receives payments from his or her former law firm of accounts receivable for legal services provided by the judge prior to assuming judicial office and or receives payments of retirement benefits from his or her former law firm pursuant to the law firm agreement, the judge must list the former law firm as a source of income on the annual financial disclosure statement. Such payments are not required to be reported on the Quasi-Judicial or Extra-Judicial Activity Compensation Report.

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 Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Attorney's Oath of Office.