

ADVISORY OPINION 95-11  
(June 16, 1995)

## **Disqualification in Cases Involving Former Law Partners**

### **Issues**

1. Is a judge required to give notice to parties and their attorneys of his or her previous partnership association with an individual lawyer who represents a party in the judge's court?

**Answer:** Yes, for a reasonable period of time.

2. Should a judge automatically disqualify himself or herself in such circumstances even though the judge does not believe that he or she is biased?

**Answer:** Yes, if the judge believes his or her impartiality might reasonably be questioned.

3. Under such circumstances, for what period of time must the judge recuse himself or herself automatically?

**Answer:** There is no specific time limitation and a "reasonableness test" should be applied.

### **Facts**

Upon taking the bench four years ago, a superior court judge was informed by his presiding judge that he must recuse himself from any cases in which his former law partner represented one of the parties for a period of three to five years. When he pointed out that this was contrary to what he had been told at the new judges' orientation, he was instructed to inform litigants of his former partnership and to offer to recuse himself upon request, which he has done.

The judge believes in automatically disqualifying himself in any matter that was within the firm when he became a judge or which involves long-time clients of the firm, but believes that disclosure of his former partnership with a lawyer in cases with which he is not familiar is unnecessary because it immediately gives the appearance that he may be biased, even though he believes he is not. The judge believes it places an unfair burden on the litigants to decide whether to be nice to the judge and allow him to continue to hear the case or risk impairing future relationships with the judge by suggesting he is biased and should disqualify himself.

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### Discussion

The question presented here is whether or not a judge's former partnership with a lawyer representing a party appearing in the judge's court might reasonably give rise to a question with respect to the judge's impartiality. Canon 3E(1) is not discretionary, but requires that a judge shall disqualify himself or herself in the proceeding in which the judge's impartiality might reasonably be questioned. Some judges avoid the appearance of partiality by routinely disqualifying themselves from proceedings in which former associates from their law offices are involved whether or not the particular matter was pending before the judge left the firm. Such action would appear to be a safe harbor; however, the committee believes that disqualification is not required in all instances where the judge merely had a prior professional relationship with an attorney presently appearing before the judge. A policy requiring judges to disqualify themselves simply because they had prior professional relationships with attorneys would be burdensome on the judiciary, particularly in rural areas where there are few judges and where judges know many of the litigants and lawyers.

Judges are required to disqualify themselves if they believe their impartiality might reasonably be questioned. However, even if judges feel compelled to disqualify themselves under the provisions of Canon 3E (1), they may continue to participate in the proceedings if the provisions of Canon 3F are followed and complied with. Canon 3F provides:

A judge disqualified by the terms of Section 3E may, instead of withdrawing from the proceeding, disclose on the record the basis of the disqualification. If the parties and their lawyers after disclosure and an opportunity to confer outside of the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceedings . . . .

The canons do not appear to provide any clear guidance as to how long judges would be required to automatically disqualify themselves or give notice of their prior association with a lawyer appearing in their courts, and the committee is not inclined to provide specific time limitations either. Rather, the committee submits that the trend with respect to disqualification is to apply a "reasonableness test" and the committee believes that is the appropriate way to resolve these issues.

The committee is of the opinion that judges should apply a "reasonableness test" in all instances where Canon 3E(1) issues arise and must use their best judgment as to whether or not to disqualify themselves automatically.

The test would appear to be whether a person of ordinary prudence in the judge's position knowing all the facts known to the judge could find that there is a reasonable basis for questioning the judge's impartiality. *See SCA Services, Inc. v. Morgan*, 557 F.2d 110 (7th Cir. 1977). Stated another way, would the facts known to the judge suggest the appearance of impropriety to a reasonable person?

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If the answer is "yes," then the judge is required to disqualify himself or herself under Canon 3E(1); however, the judge could continue to participate in the proceedings so long as the provisions of Canon 3F are complied with. If the answer is "no," then the judge is not required to take any action. In cases where a judge has great difficulty in determining whether or not to apply the rule, the committee believes that the judge should proceed on the side of caution. Facts which may be helpful in assisting the judge in making a decision could be the size of the firm, the closeness and duration of the association and how much time has elapsed since the judge was associated with the firm or attorney.

### **Applicable Code Sections**

Arizona Code of Judicial Conduct, Canons 3E(1) and 3F (1993).

### **Other References**

*SCA Services, Inc. v. Morgan*, 557 F.2d 110 (7th Cir. 1977).