

*Arizona Supreme Court  
Judicial Ethics Advisory Committee*

ADVISORY OPINION 98-02  
(March 24, 1998)

**Disqualification Considerations When Complaints  
Are Filed Against Judges**

**Issue**

Is a judge ethically obligated to automatically recuse himself or herself from a case in which one of the litigants has filed a complaint against the judge with the Commission on Judicial Conduct?

**Answer:** No.

**Facts**

A litigant filed a complaint against the judge with the Commission on Judicial Conduct during the course of pending litigation. The litigant then requested that the judge disqualify himself because of the pending complaint. When the judge refused to do so, the litigant claimed he could not receive a fair hearing due to the judge's alleged bias and the pending complaint.

**Discussion**

The determination of the issue presented here is an elaboration of the issues considered in Opinion 96-14 in which we concluded that a judge is not automatically disqualified when a litigant files a lawsuit against the judge in a pending case.

It is not unusual for an attorney or a litigant to request a change of judge prior to or during a trial or other court proceeding under the statute and rules governing disqualification in civil and criminal cases. A.R.S. §12-409; Rule 42(f)(2), Ariz. R. Civ. P.; and Rule 10.1(a), Ariz. R. Crim. P. While the civil and criminal rules differ as to the specific grounds required to support a change of judge for cause, the broadest provision of each rule permits the allegation of specific facts demonstrating prejudice on the part of the judge as the reason why an impartial trial or proceeding cannot be obtained. Occasionally, however, a party or a lawyer for a party will file a complaint against the judge with the Commission on Judicial Conduct and then claim that the judge cannot be impartial because of the complaint.

While a motion for a change of judge for cause is determined by a neutral judge, the Code of Judicial Conduct places a continuing and affirmative duty on the judge to recuse himself or herself from any proceeding in which his or her "impartiality might reasonably be questioned." This affirmative ethical standard may require considerable introspection and intellectual honesty on the part of the judge during any phase of a court proceeding regardless of whether a complaint has been filed with the Commission.

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Canon 3E deals with the issue of disqualification and provides that a judge must disqualify himself or herself whenever the judge's impartiality might reasonably be questioned. The canon describes a number of situations in which a judge's impartiality would reasonably be questioned, and in those situations recusal is mandatory. The canon makes it clear, however, that the requirement of disqualification is not limited to the situations described in the canon.

The situations described in Canon 3E generally cover instances where: (a) a judge has a personal bias or knowledge of disputed facts in a proceeding, (b) a judge has previous service as an attorney or is a material witness in the proceeding, (c) a judge has a financial interest in the proceeding, or (d) a judge has a family relationship with someone involved in the proceeding. One should note that the non-exhaustive list of circumstances requiring disqualification found in Canon 3E does not include a litigant or an attorney's decision to file a complaint against the judge; rather, they involve the relationship between a judge and the subject matter of a pending proceeding or its participants.

The mere fact that a complaint has been made against a judge alleging the judge is biased and cannot be impartial does not require automatic disqualification or recusal by the judge. If this were so any party or attorney could easily disrupt court proceedings at any time by filing a complaint against the judge. As noted by Shaman, *et.al.* in *Judicial Conduct and Ethics*, § 4.06 (2d ed. 1995): "Where a party or the party's attorney acts toward a judge in a manner calculated to create bias or prejudice, disqualification of the judge ordinarily will not be required. A party should not be able to engage in 'judge-shopping' by manufacturing bias or prejudice that previously did not exist." *See also* Calif. Op. 45 (January 23, 1997).

It is also clear that judicial bias or prejudice must stem from an extrajudicial source and not from the judge's rulings or enforcement of orders in the pending case. Generally the judge's attitude or relationship with a litigant's attorney in the case will not be grounds for disqualification although this may be a matter of degree. (*See Vento, Annotation, Disqualification of a Judge for Bias Against Counsel for a Litigant*, 54 ALR5th 575; *see also, Miller v. Superior Court*, 244 Ariz. Adv. Rep. 19, 938 P.2d 1128 (App. 1997), where the Court of Appeals held that a judge need not recuse himself in a pending legal matter where the judge had reported an attorney's conduct in the underlying action to the Arizona State Bar.) Additionally, any complaint of bias against a judge by a litigant or an attorney under the code must be supported by specific facts and circumstances sufficient for a reasonable person who is uninvolved in the proceeding to make a determination of whether the judge's impartiality might reasonably be questioned.

Of course, if the judge against whom a complaint is filed believes the circumstances described in the complaint are true and show that the judge's impartiality might reasonably be questioned, the judge must recuse himself or herself. Also, if, for whatever reason, the judge develops a personal bias that would inhibit the judge's ability to remain impartial and deal fairly with the parties, the judge must recuse himself or herself.

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The most difficult situation is where a judge believes that the specific allegations in a complaint are untrue yet still believes he or she can continue to act with impartiality in the proceedings. Here the judge must apply the standard of objective reasonableness. It is not a question of whether the judge thinks he or she can be objective, but rather would an objective, disinterested observer reasonably question the impartiality of the judge. In Opinion 96-14, we wrote as follows:

The more difficult assessment is the objective one, whether one external to the case might reasonably question the judge's impartiality. Understandably, judges tend to err on the side of safety and to judge the reasonableness of questioned impartiality from the standpoint of the most darkly suspicious member of the public. That is not the test. Rather, it is “whether an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal was sought (or disqualification contemplated) would entertain a significant doubt that justice would be done in the case.” Judges should not act hastily in manufacturing reasons to avoid judging. It is the real, not the chimerical, appearance of bias and prejudice that disqualifies. [Citation omitted.]

The objective standard clearly requires disqualification when any of the factual conditions described in Canon 3E are present. But as one legal scholar has noted, this is not the only requirement of this standard:

The objective standard appears to require disqualification not only when there is in fact impropriety, but also when there is an appearance of impropriety. Indeed, it has been stated that avoiding the latter is “as important to developing public confidence in the judiciary as avoiding impropriety itself.” The appearance of impropriety may sometimes bar trial by judges who have no actual bias and would do their very best to weigh the scales of justice equally between contending parties.

Abramson, *Judicial Disqualification Under Canon 3 of the Code of Judicial Conduct* (2d ed. 1992) at 15,16.

But even when considering disqualification because of an appearance of impropriety, there are reasonable standards to apply.

The appearance of impropriety standard requires recusal “not merely when the judge's impartiality might somehow be questioned, but only when it may *reasonably* be questioned” . . . Contrary to some authority, then, if a motion to recuse includes allegations that the judge knows are false and erroneous, the judge should recuse himself only if the motion raises reasonable issues of impartiality, not merely because the litigant or counsel makes the allegations and therefore believes in their reasonableness.

*Id.* at 16. Again, the test is whether an objective, disinterested, fully informed observer would reasonably question the impartiality of the judge.

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Thus, a judge faced with a complaint is not automatically disqualified from the case; however, a careful analysis must be undertaken by the judge which involves both subjective and objective components. The following guide may be helpful to the analysis:

1. Has the complaint previously been presented under the statutes and rules governing removal of a judge for cause and ruled upon by a neutral judge? If so, the judge may usually rely on such ruling and the party will have a remedy by appeal if appropriate.

2. Does the complaint allege bias based upon the judge's rulings in the pending case or the judge's perceived attitude toward counsel for a litigant? If the complaint arises out of previous adverse rulings in the course of the proceedings or from enforcement of court orders, then recusal is generally not warranted. If the complaint concerns the judge's perceived attitude toward a litigant's lawyer, this also, is generally not a basis for recusal.

3. Does the complaint lack merit on its face and appear to be a tactical maneuver designed merely to remove the judge from the particular case? If so, recusal is generally not warranted. In fact many complaints are dismissed by the commission after an initial contact with the judge. *Bulletin* at 1.

4. Does the complaint cause any actual personal bias that will interfere with the judge's impartiality? If so, the judge must recuse himself or herself.

5. Does the complaint allege specific facts and information regarding matters extrajudicial to the pending proceeding as the basis for the complaint? If so, does the complaint, even if believed by the judge to be untrue or erroneous, contain specific facts which would cause a reasonable person to question the judge's impartiality or create an appearance of impropriety to a reasonable person if the judge remains on the case? If the answer is yes, the judge must recuse himself or herself. Here the judge must take into account the risk of injustice to the parties in the particular case and the risk of undermining public confidence in the judicial process.

In conclusion, a judge is not automatically disqualified from sitting in a proceeding merely because the judge is made aware that an attorney or a party has filed a complaint against him or her with the Commission on Judicial Conduct. A careful analysis of Canon 3E and reflection on the principles outlined in this opinion should provide the guidance necessary for making the correct decision.

### **Applicable Code Sections**

Arizona Code of Judicial Conduct, Canon 3E (1993).

### **Legal References**

Arizona Revised Statutes § 12-409.

Arizona Rules of Civil Procedure, Rule 42(f)(2).

Arizona Rules of Criminal Procedure, Rule 10.1(a).

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Arizona Judicial Ethics Advisory Committee, Opinion 96-14 (Nov. 21, 1996).

Arizona Judicial Conduct and Ethics Bulletin, January 1993 at 1.

California Committee on Judicial Ethics, Opinion 45 (Jan. 23, 1997).

*Miller v. Superior Court*, 244 Ariz. Adv. Rep. 19, 938 P. 2d 1128 (App. 1997).

### **Other References**

Leslie W. Abramson, *Judicial Disqualification Under Canon 3 of the Code of Judicial Conduct* (2d ed. 1992).

Jeffrey M. Shaman, Steven Lubet & James J. Alfani, *Judicial Conduct and Ethics*, § 4.06 (2d ed. 1995).

Carol Schultz Vento, Annotation, *Disqualification of Judge for Bias Against Counsel for Litigant*, 54 ALR5th 575.