

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

ADVISORY OPINION 06-01
April 18, 2006

**Disqualification of Former City Prosecutor
Appointed to City Court Bench**

Issues

1. Is a former chief city prosecutor now sitting as a municipal court judge required to disqualify himself or herself in cases that were issued or charged while the judge was the city prosecutor?

Answer: Yes.

2. Is the judge required to disqualify himself or herself in cases being prosecuted by former subordinates that were filed after the judge left the prosecutor's office?

Answer: There is no requirement for automatic disqualification.

3. If there is no per se disqualification of the judge based solely on prior association, what additional facts or circumstances might give rise to the need for the judge to disqualify himself or herself?

Answer: See discussion.

Facts

A chief city prosecutor was appointed to serve as an associate judge in the same municipality in which he previously served as prosecutor. In that position, he had been the head of the office that files and maintains all criminal prosecutions in city court, and his name appeared on all charging documents and other court filings during the four years he served as chief prosecutor. In that time, he also hired, trained and supervised a staff of assistants who appear regularly and almost exclusively in the municipal court, prosecuting misdemeanors.

Discussion

Issue One

The judge must disqualify himself in all cases he handled in the prosecutor's office. Canon 3E(1) states, in part, "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned," including, under subsection (b), instances in which "the judge served as a lawyer in the matter in controversy. . . ." As noted in *Judicial Conduct and Ethics*, §140 (3rd ed. 2000) "[J]udges must disqualify themselves from cases in which they were personally involved before they became trial, post-conviction, or appellate judges." Additionally, if the judge personally had been the prosecutor in a particular case, or had consulted with and directly supervised the prosecutor who took the case into court, the judge might well be disqualified under Canon 3E(1)(a), which requires disqualification if "the 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"

Advisory Opinion 06-01

Canon 3E(1)(b) also contains a provision requiring disqualification if “a lawyer with whom the judge practiced law within the preceding seven (7) years served during such association as a lawyer concerning the matter,” but the word “association” as used in that provision does not include government agencies, such as prosecutor’s offices. The commentary to this provision states:

A lawyer in a government agency does not ordinarily have an association with the other lawyers employed by that agency within the meaning of Section 3E(1)(b); a judge formerly employed by a government agency, however, should disqualify himself or herself in a proceeding if the judge’s impartiality might reasonably be questioned because of such association.

Thus, a lawyer in a government agency, such as a deputy county attorney, assistant attorney general, or assistant city prosecutor, who becomes a judge will not automatically be barred from serving as a judge on a case handled by another lawyer in the government agency at some time within the previous seven years.

The commentary to the ABA’s Model Code notes a split of authority “over whether a judge who had previously served as the head of an office, such as district attorney or attorney general, is disqualified from presiding over a case pending in that office while he served in that position.” ABA, Annotated Model Code of Judicial Conduct, Canon 3E(1), commentary, at 222 (2004). The Arizona Supreme Court has placed this state among the jurisdictions which do not allow a former senior prosecutor to serve as a judge in a case that was handled while the judge was still in the prosecutor’s office. In *State ex rel. Corbin v. Superior Court*, 155 Ariz. 560, 562, 748 P.2d 1184, 1186 (1987), the court held “under Canon 3(C)(1), the impartiality of a judge may reasonably be questioned when adversarial proceedings in a criminal case are assigned to a judge who was a member of the staff of the prosecuting attorney at the time prosecution commenced.” The judge in *State ex rel. Corbin* had not participated in prosecuting the defendant, but “had been a supervisory member of the staff of the prosecuting attorney’s office which represented the state while the case was tried, the original sentence was imposed, and the direct appeal decided,” 155 Ariz. at 561, 748 P.2d at 1185, and so he was disqualified from handling the defendant’s resentencing.

We believe that a judge, whose name appeared on the charging document or other court papers while serving as chief city prosecutor, should recuse himself from any case originating or pending in the prosecutor’s office while he held a supervisory position there.

Issue Two

If a case arose in the prosecutor’s office after the judge took the bench, disqualification is not necessarily required. In Advisory Opinion 95-11, this committee concluded that a judge is not automatically required to disqualify himself or herself in cases involving former partners unless the judge believes that his or her impartiality might be reasonably questioned. In that opinion, the committee stated, “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 opinion continued:

Advisory Opinion 06-01

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. [Citation omitted.] Stated another way, would the facts known to the judge suggest the appearance of impropriety to a reasonable person?

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 [dealing with remittals of disqualification] are complied with. If the answer is "no," then the judge is not required to take any action. . . ."

The relationship between a chief prosecuting attorney and his or her associates is not the same as a partnership of attorneys in a law firm, as the commentary to Canon 3E(1)(b) explains. Still, the test stated in Opinion 95-11 is applicable here.

Issue Three

Routine disqualification of a judge simply because the judge formerly supervised the prosecutors who now appear in the judge's court would seriously affect judicial administration. *See Prior Representation or Activity as Prosecuting Attorney as Disqualifying Judge from Sitting or Acting in Criminal Case*, 85 A.L.R. 5th 471 (2001). There are various factors the judge should consider before deciding whether to disqualify himself or herself because of prior association with the prosecutor. According to Op. 95-11, the judge should consider factors such as "the size of the firm [or, as in this case, the size of the prosecutor's office], the closeness and duration of the association[,], and how much time has elapsed since the judge was associated with the firm or attorney [or worked in the prosecutor's office]." *See also Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned,"* 14 Geo. J. Legal Ethics 55 (2000) (disqualification dependent on three factors: relationship between a proceeding handled as a prosecutor and a later proceeding involving the same defendant handled by the former prosecutor who is now a judge, amount of time between the two proceedings, and whether past prosecution is relevant to current case).

Conclusion

We believe the nature and extent of the relationship between a newly-appointed judge and his former associates in the prosecutor's office should guide the judge on the question of disqualification. If the judge had a social relationship, or a particularly close working relationship, with one of the assistant city prosecutors, prudence would suggest a period of time during which the new judge should decline to hear cases handled by that prosecutor. But in a case originating after the judge takes the bench, disqualification should not result from the mere fact that the judge previously supervised the prosecutor who appears in the judge's court. As a practical matter, many qualified prosecutors, including chief prosecutors, are appointed to the bench based on their expertise and experience, and it would be both unrealistic and unfair, as well as unnecessarily burdensome to the justice system, to expect they will be foreclosed from hearing cases prosecuted by their former subordinates.

Advisory Opinion 06-01

Applicable Code Sections

Arizona Code of Judicial Conduct, Canon 3E(1)(a) (1993).

Arizona Code of Judicial Conduct, Canon 3E(1)(b) and Commentary (1993).

References

American Bar Association, Annotated Model Code of Judicial Conduct, Canon 3E(1), Commentary (2004).

Arizona Judicial Ethics Advisory Committee, Opinion [95-11](#) (June 16, 1995).

Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned,"* 14 Geo. J. Legal Ethics 55 (2000).

Jeffrey M. Shaman, *Judicial Conduct and Ethics* §140 (3rd ed. 2000).

State ex rel. Corbin v. Superior Court, 155 Ariz. 560, 562, 748 P.2d 1184, 1186 (1987).

Jay M. Zitter, Annotation, *Prior Representation or Activity as Prosecuting Attorney as Disqualifying Judge from Sitting or Acting in Criminal Case*, 85 A.L.R. 5th 471 (2001).