

Opinions from the Advisory Committee on Judicial Ethics

The Advisory Committee on Judicial ethics (www.nycourts.gov/ip/acje) responds to written inquiries from New York State's full- and part-time judges, candidates for elective judicial office, and quasi-judicial officials such as support magistrates, court attorney-referees, and judicial hearing officers. The committee's opinions interpret the rules governing Judicial Conduct (22 NYCRR Part 100), the Code of Judicial Conduct and Part 36 of the rules of the Chief Judge (22 NYCRR Part 36). Justice George D. Marlow chairs the committee of 26 judges, and Maryrita Dobiela, Esq. is its Chief Counsel.

Opinion 08-71 April 24, 2008

Digest: (1) A judge whose law clerk was formerly a non-supervisory staff attorney for a Legal Aid organization may preside over criminal cases in which a defendant is currently represented by Legal Aid, but should insulate the law clerk and disclose the prior employment when the law clerk was personally involved in the case. Upon application for recusal, the judge should exercise discretion in light of the facts presented.

(2) During the interim period after the judge has hired a Legal Aid staff attorney as his/her law clerk but the attorney has not yet formally commenced the new employment, the judge may continue to preside over cases that have been reassigned to other Legal Aid staff attorneys, subject to full disclosure to all parties. Upon application for recusal, the judge should exercise discretion in light of the facts presented.

(3) During this interim period, the judge is disqualified from presiding over any matters in which his/her new hire appears, subject to remittal if the judge believes he/she can be fair and impartial.

Rule: 22 NYCRR 100.2; 100.2(A); 100.3(e)(1); 100.3(F); Joint opinion 07-105/07-119; opinions 07-04; 00-66 (Vol. XIX); 99-91 (Vol. XVIII); 97-59 (Vol. XV); 93-132 (Vol. Xi).

Opinion:

A criminal court judge recently has hired an attorney to work as his/her law clerk, whose employment with the judge will begin in six weeks. The future law clerk currently is employed as a non-supervisory staff attorney with a Legal Aid organization and regularly appears before the judge in that capacity. The future law clerk plans to transfer his/her cases that currently are pending in the judge's part to other Legal Aid attorneys. The judge asks if he/she must insulate the new law clerk from all cases in which the Legal Aid organization appears as counsel. The judge also asks if, during the 6-week interim period before the attorney commences employment at the court, the judge may preside (a) over cases that his/her future law clerk has transferred to other Legal Aid attorneys and (b) over routine calendar appearances, arraignments or omnibus motions, or other such matters that the judge considers to be ministerial in nature, in which the attorney appears, after disclosure to and consent of all parties.

A judge must "avoid impropriety and the appearance of impropriety" (22 NYCRR 100.2) and "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" (22

NYCRR 100.2[A]). This Committee has concluded that a judge need not exercise recusal when his/her law clerk's former employer appears before the judge (see Joint opinion 07-105/119). Thus, a judge may preside over criminal cases, even if the law clerk was formerly employed in the prosecutor's office (see opinions 00-66 [Vol. XIX]; 93-132 [Vol. Xi]). So, too, may a judge preside over criminal matters in which the defendant is represented by Legal Aid, the law clerk's former employer.

In some situations, however, the law clerk must be insulated from a matter based on his/her prior employment. Where the clerk's former employer is a Legal Aid organization, the judge must make full disclosure and insulate the law clerk from all matters in which the law clerk was personally involved (cf. Joint opinion 07-105/119). Unlike the rule where the former employer is a private law firm, insulation is not required for matters in which the law clerk was not personally involved (compare opinion 99-91 [Vol. XVIII]).

Upon application for recusal after disclosure of the law clerk's prior employment and current insulation, a judge should exercise his/her discretion in light of the facts presented in the particular case, in deciding such application (see Joint opinion 07-105/119).

During the interim period before the attorney commences employment with the court system, the judge should ask the future law clerk for a list of cases that he/she transferred to other Legal Aid attorneys so that the judge can disclose to all parties that his/her future law clerk previously was involved in the matter. The judge may, however, continue to preside as described above.

Finally, the Committee concludes that during this interim period the judge should not preside over any matters in which his/her future law clerk appears, even if the judge deems these appearances to be "routine" or ministerial in nature (cf. opinion 97-59 [Vol. XV] [requiring disqualification from arraignments in which judge's son was arresting police officer]). The judge has already made a commitment of employment to the attorney that demonstrates a relationship of "particular trust and confidence" between them (see opinion 07-04) such that the judge's impartiality "might reasonably be questioned" (22 NYCRR 100.3[e][1]) should he/she preside. Disqualification during this interim period is, however, subject to remittal if the judge believes he/she can be fair and impartial (22 NYCRR 100.3[F]; 97-59 [Vol. XV]).