

Opinions from the Advisory Committee on Judicial Ethics

[From time to time, NYPRR will publish an Opinion of the Advisory Committee on Judicial Ethics. The Opinions published are those selected by Justice George D. Marlow, Committee Chair, and Jeremy R. Feinberg, who serves among the Committee's Counsel. Permission to reprint the Opinion below was requested by NYPRR because of its significance to New York lawyers who appear before the Courts.]

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 08-134

September 11, 2008

Digest: A judge whose former law clerk is now employed as an Assistant Attorney General, with a discrete unit that litigates a particular type of case, is not disqualified from presiding, and need not disclose in all cases where the Attorney General appears that his/her former law clerk is an Assistant Attorney General. However, the judge is disqualified from presiding (1) in cases where the former law clerk appears, for a period of one year after the judge's former law clerk's employment with the court ends; (2) in cases that were pending at the time the former law clerk was employed by the court where the unit that now employs the judge's former law clerk is involved; and (3) in cases where the unit that now employs the judge's former law clerk is involved that were commenced during the first year after the judge's former law clerk left the court's employ, if the former law clerk has had any involvement in the case. In each of these situations, the judge's disqualification is subject to remittal, unless a party is self-represented.

Rules: 22 NYCRR 100.2; 100.2(A); 100.3(E)(1); 100.3(F); 07-173; 07-04; 04-35; 98-14 (Vol. XVI); Opinion 93-61 (Vol. XI); 91-10 (Vol. VI); 90-197 (Vol. VII).

Opinion:

A judge whose former law clerk is now employed as an Assistant Attorney General asks whether he/she must disclose or exercise recusal in cases where another Assistant Attorney General from the former law clerk's unit appears in the judge's court or in all cases involving the Attorney General's Office.

A judge must avoid impropriety and the appearance of impropriety in all the judge's activities (see 22 NYCRR 100.2), and must act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (see 22 NYCRR 100.2[A]). Therefore, a judge must disqualify him/herself in any proceeding where the judge's impartiality might reasonably be questioned (see 22 NYCRR 100.3[E][1]).

This Committee has previously determined that the relationship between a judge and his/her law clerk is one of particular trust and confidence, not unlike that of long-term colleagues in a law firm (see Opinion

07-04). Therefore, for a period of one year after a law clerk leaves a judge's employ, the judge should disclose his/her relationship with his/her former law clerk when the former law clerk appears in the judge's court and exercise recusal upon request (see Opinion 07-04; 04-35). A judge also must disclose his/her relationship with a prior law clerk when an attorney associated with the judge's prior law clerk in the private practice of law appears in the judge's court (see Opinion 07-173).

In the present inquiry, the judge's former law clerk is not engaged in the private practice of law, but is an Assistant Attorney General assigned to a discrete unit that litigates a particular type of case. The Committee has previously considered whether a judge is disqualified from presiding in a case prosecuted by the Attorney General's Office at the same time the judge is one of a class of judges or an individual party represented by the Attorney General's Office in federal court. In Opinions 90-197 (Vol. VII) and 98-14 (Vol. XVI), the Committee advised that a judge need not exercise recusal in a matter prosecuted by the Attorney General's Office under these circumstances unless the same Assistant Attorney General was involved in both matters. In Opinion 98-14 (Vol. XVI), the Committee noted that:

Representation by the Office of the Attorney General is not to be analogized to that of representation of a judge in a personal matter by a law firm, where disqualification might be required whenever any member of the firm appears. See e.g. Opinion 93-61 (Vol. XI), 91-10 (Vol. VI)... [I]t cannot be said that there is a unity of interest among Assistant Attorneys General throughout the State as there presumably is among members of a private law firm, so as to require disqualification.

This rationale is relevant to the present inquiry as well. The inquiring judge, therefore, need not disqualify him/herself in every proceeding in which the Attorney General appears (see Opinion 07-04; 04-35). The judge, however, is disqualified from presiding (1) for a period of one year after the judge's former law clerk's employment with the court ends, in cases where the former law clerk appears (see *id.*); (2) in cases that were pending before the judge at the time the former law clerk was employed by that judge where the unit that now employs the judge's former law clerk is involved (see Opinion 04-35); (3) in cases where the unit that now employs the judge's former law clerk is involved that were commenced during the first year after the former law clerk left the court's employ, if the former law clerk has had any involvement in the case. In each of these situations, however, if the judge discloses the basis for his/her disqualification, and the parties who have appeared and not defaulted and their lawyers, without the judge's participation, all agree on the record that the judge should nevertheless preside, and the judge believes he/she will be impartial and is willing to participate, the judge may participate in the proceeding. Absent an agreement to remit the disqualification, the judge must recuse him/herself from the proceeding (see 22 NYCRR100.3[F]). However, as this provision requires the consent of the parties and their lawyers (see *id.*), remittal is not available when a party is self-represented.