

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 Dobielski, Esq. is its Chief Counsel.

Opinion 08-91

June 6, 2008

Digest: (1) A recently elected full-time judge is not necessarily disqualified from presiding when the former chief court attorney who left the court immediately before the judge assumed the bench appears in the judge's court. The judge may ask relevant questions to determine if the former chief court attorney's current role representing clients in the judge's court creates an appearance of impropriety and must be guided by the Code of Professional Responsibility and any applicable case law and statutes. The judge also may question the former chief court attorney's partners and/or associates for the same purpose. (2) For two years after the chief court attorney's employment with the court ended, a court attorney referee who was subject to the former chief court attorney's supervision should disqualify him/herself when the former chief court attorney appears before him/her. Such disqualification is subject to remittal. (3) A court attorney referee also may question the former chief court attorney's partners and/or associates to determine if their involvement in a case that was pending in the court during the chief court attorney's tenure creates an appearance of impropriety.

Rules: 22 NYCRR 100.2(A); 100.2(B); 100.3(E); 100.3(F); 100.6(A); 101.1; opinions 08-12; 05-96; 04-121.

Opinion:

A recently elected full-time judge asks whether he/she may preside when the former chief court attorney or his/her associates appear before him/her as attorneys. The attorney left the position of chief court attorney immediately prior to the date the judge assumed the bench.

A judge 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]). He/she shall not allow family, social, political or other relationships to influence his/her judicial conduct or judgment (see 22 NYCRR 100.2[B]) and must disqualify him/herself in any proceeding in which his/her impartiality might reasonably be questioned (see 22 NYCRR 100.3[E]). In opinion 04-121, the Committee advised that a judge is not necessarily disqualified when a former judge of the court appears before him/her as an attorney. Rather, "[i]t is for each judge of the court to determine for him or herself whether the relationship with a former full-time judge or a part-time judge is of such a nature that an appearance of partiality might be created" (id.).

Here, the attorney appearing before the inquiring judge served not as a judge, but as the chief court attorney, and left the court before the judge assumed the bench. It is the Committee's view, therefore, that the inquiring judge is not necessarily disqualified when the former chief court attorney appears before him/her. The judge must determine whether there is any other factor that warrants his/her disqualification.

Where the former chief court attorney appears on cases that were pending in the court while he/she served in that capacity, "... the judge may ask such questions as are relevant in each case to determine if there is a conflict between the attorney's current role representing clients before the court and the attorney's former role as court attorney for the same court. The answers to any such questions will serve to inform the parties of the extent of the attorney's actual involvement in a particular case as a court attorney and will allow the judge to evaluate whether the attorney's continued involvement would create an appearance of impropriety" (Opinion 05-96). The judge in the present inquiry, therefore, may question the former chief court attorney when he/she appears to determine if his/her continued involvement in a particular case will create an appearance of impropriety. As the Code of Professional Responsibility and any applicable statutes or case law govern the propriety of an attorney's appearance in such cases, the Committee declines to comment on any issues to be considered in that regard as they are beyond the Committee's jurisdiction (see 22 NYCRR 101.1 [There shall be an Advisory Committee on Judicial Ethics to issue advisory opinions to judges and justices of the Unified Court System concerning issues related to ethical conduct, proper execution of judicial duties, and possible conflicts between private interests and official duties]).

The judge also may question the former chief court attorney's partners and/or associates, who appear on cases that were pending in the court while the chief court attorney was employed by the court, to determine both the extent of the former chief court attorney's involvement in the case while he/she was employed there, and the extent to which the former chief court attorney has discussed the case with his/her partner and/or associate appearing on the case since his/her employment by the court ended (see NYCRR 100.2[A]; Opinion 05-96). The judge should refer to the Code of Professional Responsibility and any applicable statutes or case law to determine the propriety of a partner's or associate's appearance in such cases.

The judge also asks whether it is appropriate for the former court attorney or his/her associates to appear before court attorney referees in the judge's court. The judge advises that the chief court attorney was expected to review all files sent to the court, to assign the files to a court attorney referee, to provide direction to the assigned court attorney referee as to how a case should proceed, and to review all substantive decisions.

Court attorney referees are subject to the Rules governing Judicial Conduct in the performance of their judicial functions (see 22 NYCRR 100.6[A]; Opinion 08-12), and therefore also 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]). Like a judge, a court attorney referee cannot allow family, social, political or other relationships to influence his/her conduct or judgment (see 22 NYCRR 100.2[B]) and must disqualify him/herself in any proceeding in which his/her impartiality might reasonably be questioned (see 22 NYCRR 100.3[E]).

In the Committee's view, a court attorney referee's impartiality might reasonably be questioned when his/her former supervisor appears before him/her and, therefore, should disqualify him/herself from all

proceedings in which the former supervisor appears for two years after the former supervisor's employment with the court ended (see 22 NYCRR 100.3[E]). If a court attorney referee discloses the basis for his/her disqualification, however, and the parties who have appeared and not defaulted and their lawyers, without the court attorney referee's participation, all agree on the record that the court attorney referee should nevertheless preside, and the court attorney referee believes he/she will be impartial and is willing to participate, the court attorney referee may participate in the proceeding (see 22 NYCRR 100.3[F]). Absent an agreement to remit the disqualification, the court attorney referee must recuse him/herself from the proceeding.

As is the case with the judge, a court attorney referee also may question the former chief court attorney's partners and/or associates, who appear on cases that were pending in the court while the chief court attorney was employed there, to determine both the extent of the former chief court attorney's involvement in the case while he/she was employed by the court and the extent to which the former chief court attorney has discussed the case with his/her partner and/or associate appearing on the case since his/her employment by the court ended (see NYCRR 100.2[A]; Opinion 05-96). A court attorney referee also should refer to the Code of Professional Responsibility and any applicable statutes or case law to determine the propriety of a partner's or associate's appearance in such cases.