Arizona Supreme Court
Judicial Ethics Advisory Committee

ADVISORY OPINION 92-11
(September 9, 1992)

Potential Conflicts When Appearing Attorney Belongs to the Same Law Firm as Attorney Representing the Judge in an Unrelated Case

Issue

May a judge who is represented by an attorney in a lawsuit preside over an unrelated case in which a member of the attorney's law firm represents one of the parties?

Answer: Yes, with qualifications.

Facts

A superior court judge was sued in connection with a matter arising out of a motor vehicle accident. The judge's insurance carrier referred the matter to a local law firm, and a member of the firm now represents the judge in connection with the litigation. Prior to this lawsuit, the judge had a medical malpractice suit pending on his calendar that had been continued on stipulation from an earlier date. A motion for summary judgment was pending in the case. Although the attorneys are different, the firm that represents the judge in the motor vehicle case also represents one of the defendants in the medical malpractice case.

Discussion

The first question which arises in this situation is whether the judge's relationship creates bias or prejudice. Canon 3C(1)(a) states that a judge's personal bias or prejudice requires disqualification of the judge. The judge in the present situation presides over a case in which a lawyer is a member of the same law firm as the judge's lawyer in an entirely unrelated automobile accident case. The judge's automobile insurance company selected his counsel. If the judge were biased or prejudiced as a result of this relationship, then disqualification is mandatory under Canon 3C(1)(a).

If the relationship causes bias or prejudice, the judge cannot cure the problem with disclosure of the relationship and the parties' stipulation to allow the judge to proceed. See Canon 3D. Canon 3D disclosure and stipulation applies only to the specific instances listed under 3C(1)(c) and 3C(1)(d). The present situation fits neither 3C(1)(c) or 3C(1)(d). Canon 3C(1)(a)--(d) lists four specific instances where a judge should disqualify himself: (a) the judge is biased or prejudiced, (b) the judge was previously a lawyer or witness in the subject matter before him, (c) the judge's individual or family fiduciary interest is affected by the outcome of the matter, and (d) relatives of the judge are involved in the proceeding. Of these four specific instances only bias or prejudice, 3C(1)(a), potentially applies to this matter. Because (a) is the ground for disqualification, not (c) and (d), a Canon 3D disclosure and

stipulation cannot cure the problem. Disqualification is the only remedy for actual bias and prejudice. There is no indication of actual bias and prejudice in the facts as they were presented to us.

However, actual bias or prejudice is not the only difficulty presented by this matter. The list of situations calling for a judge's disqualification under 3C(1)(a)--(d) is not all-inclusive. The initial general clause of Canon 3C states that the judge should disqualify himself "in a proceeding in which his impartiality might reasonably be questioned." Canon 3C(1). Thus, disqualification is the remedy for the appearance of bias as well as for actual bias.

Would a reasonable person call into question the impartiality of a judge who presides over a case involving an attorney with whom the judge has some connection? The answer depends on three aspects of the relationship: (1) the directness of the relationship between the attorney and the judge; (2) the substance of the relationship; and (3) the length and ongoing nature of the relationship.

Where the attorney appearing before the judge and the attorney representing the judge are one in the same and the judge's relationship with the attorney is direct, substantial, and longstanding, a reasonable person could call into question the impartiality of the judge. For example, a judge should not preside over a matter in which his own long-time personal counsel is representing a party. *See* Mo. Op. 104 (1984), which recommended disqualification when the attorney was used by the judge for ongoing personal legal business such as income tax preparation.

The facts of the present matter are very different, however. The judge's lawyer is not the lawyer appearing before the judge. They are from the same firm, which is a firm of more than thirty lawyers and in which the judge's lawyer is an associate and the other lawyer a partner. The automobile collision case is entirely unrelated to the case pending before the judge. The judge's insurer selected his lawyer. The judge had no prior attorney-client relationship with that lawyer and contemplates none upon conclusion of the matter.

Some jurisdictions take a more restrictive view. New York prohibits judges from hearing cases presented by lawyers from the same law firm as any lawyer the judge has ever retained, regardless of the directness, duration and substantiality of the relationship. N.Y. Op. 511 (1979). This approach overlooks the standard set by Canon 3C(1): might the judge's partiality reasonably be questioned? We believe that the factors set forth above would be considered by a reasonable person in assessing the judge's impartiality.

Given the circumstances at hand, we find no reasonable basis for the opposing party to speculate that the judge would favor the lawyer appearing before him. The judge could derive no benefit from partiality. Moreover, in light of the nature of the relationship between the judge and the attorney representing him in the accident case, and the relationship between the lawyers involved, we see no reasonable basis to believe that the judge might favor the lawyer for any other reason. A reasonable person would not call into question the judge's impartiality in this situation. Thus, on the facts presented, disqualification is not required.

In arriving at this opinion, we recognize that difficult ethical issues concerning disqualification sometimes arise in the course of litigation. When this happens, a judge may need to consider the analysis provided here to determine the appropriate course of action in a particular case. The fundamental rule remains the same, however. A judge should do everything possible to avoid the appearance of partiality in the first place. The basic rule in Canon 3C(1) is a good one, and with minor modification, it is the same as Canon 3E in the new proposed Code of Judicial Conduct now pending before the Supreme Court: "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Then, as the commentary suggests, when unavoidable problems occur later "A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification." This is still the best advice that we can give on this issue.

The judge requesting this opinion wisely took the precaution of advising all counsel of the situation and offered to recuse if any party had any hesitancy about the judge continuing as the trial judge. The judge further advised that if they desired that the judge continue as trial judge, they would have to enter a written stipulation setting forth the facts as disclosed and agreeing that the judge should remain as trial judge in the cause. We commend this procedure. *See* Ariz. Op. 91-01 (April 29, 1991).

Applicable Code Sections

Arizona Code of Judicial Conduct, Canons 3C(1)(a)--(d) and 3D (1991).

Other References

Arizona Judicial Ethics Advisory Committee, Opinion 91-01 (April 29, 1991).

Missouri Commission on Retirement, Removal and Discipline, Opinion 104 (1984).

New York Advisory Committee on Judicial Ethics, Opinion 511 (1979).