

**Supreme Court of Vermont
JUDICIAL ETHICS COMMITTEE**

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To: The Hon. Joseph Lorman

The Committee has researched and reviewed the matters you presented to it. On April 18, 2018, the Committee received a request for clarification from the Chief Administrative Judge. The following is the revised Opinion of the Committee and a response to your inquiry pursuant to Administrative Order No. 35.

Questions Presented

1. May a magistrate judge who previously served as staff attorney for the State Office of Child Support (OCS) preside over family court cases in which OCS is a party in the counties in which he worked, and if not, is there a time period after which he can do so?
2. Is that magistrate judge required to disclose his prior employment in cases in which OCS appears outside the region in which he previously represented OCS?
3. After appointment, may a magistrate judge continue to sit on the board of directors of a nonprofit community theater?
4. After appointment, may a magistrate judge continue to volunteer for a nonprofit organization that grants wishes for children with life-threatening medical conditions?

Short Answers

As to question 1, the Committee recommends that a magistrate judge who previously served as staff attorney for OCS should not preside over family court cases in which he was identified as the attorney of record for OCS indefinitely.

As to question 2, the Committee recommends that the magistrate judge should disclose his prior employment in all cases in which OCS appears, even outside the region in which he previously represented OCS, for a reasonable period of two years following appointment.

As to questions 3 and 4, a magistrate judge may continue to sit on the board of directors of a nonprofit community theater or serve as a volunteer for a nonprofit organization, consistent with Canon 4C(3).

Facts

Prior to his recent appointment, a magistrate judge served as staff attorney for OCS in a region consisting of two counties in Vermont. The staff attorney was the attorney of record for all cases filed in those two counties in which OCS was involved, including actions to establish parentage, to establish child or medical support, to modify child support, to enforce child support orders, or for civil contempt for nonpayment of child support. OCS employed five paralegals in the region who, consistent with Family Court Rules, presented most cases to the magistrate, although the staff attorney's name appeared on the docket. The staff attorney presented all contempt cases before the magistrate and all matters before the superior judge.

The OCS staff attorney represents the state and the interests of the child, not the child's parents or guardians. He was not the direct supervisor of the OCS paralegals, who answered to a paralegal supervisor and regional manager, although he could ensure their legal work was accurate. In this region, the attorney only reviewed and signed pleadings in actions to establish parentage or for contempt, and all other pleadings were reviewed and signed by the paralegals or regional manager.

The Chief Administrative Judge determined that the Magistrate's prior role as counsel to OCS precludes him from sitting on OCS cases in Rutland and Bennington Counties for a period of time, but not on cases that did not involve OCS in those counties. The Judge also advised the Magistrate that he should disclose his previous role with OCS when he sits in other counties.

When he was appointed, the magistrate was a member of the board of directors of a local community theater nonprofit, and he immediately discontinued all involvement with

fundraising. He also serves as a volunteer for a nonprofit organization that grants wishes for children with a life-threatening medical condition, but does no fundraising for them.

Relevant Canons of Judicial Conduct

As to Questions 1 and 2, Canon 3E(1) and 3F

As to Questions 3 and 4, Canon 4C(3)

Analysis

Question 1:

Canon 3E(1) provides:

E. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonable be questioned, including but not limited to instances where:

...

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

According to the facts provided by the requestor, as the OCS attorney, even though he did not personally work on every case in his region, the magistrate served as the attorney of record in those cases. Generally, courts have held that a government attorney is not disqualified solely because of their prior employment. *See, e.g., State v. Connolly*, 930 So.2d 951 (La. 2006), citing *ABA Annotated Model Judicial Code, Canon 3(E)(1)(b)*; *People v. Julien*, 47 P.3d 1194, 1198 (CO 2002). In many cases, former prosecutors have been permitted to sit on cases handled by their previous offices if they did not directly work on the case, have personal knowledge of it, or have formed any bias about it. However, the commentary to the ABA model rule emphasizes that in any case, a former government employee should be disqualified any time their impartiality might be reasonably questioned.

Only a few states have specifically addressed the role of attorneys who represented the state's family services or child support enforcement offices. In two states, Delaware and West Virginia, advisory committees have required a former state deputy attorney general who became a judge to disqualify from any proceeding regarding a parent or a child who was a party in any prior proceedings in which the judge had represented or advised the state's family

services office. *Delaware JEAC 2002-2*; *West Virginia Advisory Opinion (Aug. 9, 1994)*. In Nebraska, the committee ruled the judge must disqualify from any proceeding in which the facts relate to the time the judge worked for the child support office, but the judge could sit on future, unrelated matters. *Nebraska Advisory Opinion 01-2*.

The issue has arisen more frequently in the case of prosecutors. Several jurisdictions have advised that a chief prosecutor, because the chief is the counsel of record in all cases, must recuse from all cases that were initiated while the prosecutor was in office, regardless of the individual's knowledge or involvement in the specific case. *See, e.g., Indiana Advisory Opinion 3-89*; *Michigan Advisory Opinion JI-34 (1990)*; *New York Advisory Opinion 89-117*. Not all of these jurisdictions agree that the recusal should apply to new cases that came into the office after the attorney left for the bench. The primary issue remains whether the judge's impartiality may reasonably be questioned because of the former employment, and several advisory committees have cautioned that the appearance of impropriety may require recusal, even if the prosecutor had no personal involvement in the case. *See, e.g., Georgia Advisory Opinion 222 (1997)*; *West Virginia Advisory Opinions (1/5/1993)*.

Because in this case, the requestor served as the attorney of record in all the OCS cases in the region, it is the opinion of the Committee that the magistrate must at minimum recuse himself from any case involving parties or matters raised in any case in which his name has appeared as the attorney of record, whether or not a paralegal handled the court proceedings in his stead. To do otherwise undermines the appearance of the judiciary as an impartial arbiter. In addition, because of the nature of family proceedings and the role of OCS, the Committee believes that the magistrate should disclose his prior employment with OCS and be sensitive to the appearance of a conflict of interest, even in cases in those two counties in which OCS did not become involved until after he left that employment, for a reasonable period of time following appointment.

The Vermont Code does not include any definition of what a reasonable period of time would be, so we must look for analogous situations. Some state codes have rules that set a specific period during which a judge should not sit on cases in which their prior law partners represent a party: Michigan Court Rule 2.003(B)(4) sets two years; Illinois Canon 3C(1)(c) sets three years. The advisory committees in other states have also suggested time periods in the absence of a code provision: *New York Advisory Opinion 94-05* suggests two years in general, but the NY Committee has emphasized that there cannot be a specific number of years that

applies to every case, as the issue is avoiding any appearance of impropriety in the eyes of an objective, disinterested observer, *New York Advisory Opinion 89-31*. *New Mexico Advisory Opinion 95-4* suggests five years (after all financial dealings are resolved). Other committees have advised that new judges should recuse themselves for a reasonable period, taking into account factors such as the following: the length of the judge's association with the former partners (*Arizona Advisory Opinion 95-11*, *Georgia Advisory Opinion 223 (1997)*; the closeness of the association (*AZ*); the amount of time since the association ended, (*AZ*, *GA*, *Utah Advisory Opinion 89-2*); the size of the firm (*AZ*, *GA*, *New York Advisory Opinion 89-31*); the size of the community (*GA*, *NY*); any financial dealings the judge has with former partners (*GA*, *NY*, *UT*); the duration and closeness of the relationships (*UT*); any continuing social relationship with the attorney (*GA*); whether the judge has a personal bias or prejudice toward the former partner (*Alabama Advisory Opinion 95-549*); the burden disqualification will place on other judges (*GA*). While these factors are not all relevant to the situation of a former government agency employee, the length of time since he left the agency, the size of the community, the size of the agency, his ongoing relationship with the agency, and the burden disqualification will place on other judges all should be considered.

Another analogy can be found in the post-employment restrictions placed on former federal government employees. *See, e.g.*, 18 U.S.C. 207(a)(2) (two year restriction on communicating to or appearing before an agency if the government has a direct interest).

While none of these examples is directly analogous to the magistrate's situation, it is the opinion of the Committee that given the nature of the family proceedings in which the magistrate would be involved and the role of OCS in those proceedings, the Committee believes it would be reasonable for the magistrate to disclose his prior employment in all cases involving OCS in the two counties for a period of at least two years to avoid any appearance of partiality.

Question 2

Canon 3F provides:

F. Remittal of Disqualification. A judge disqualified by the terms of Section 3E for any reason other than personal bias or prejudice concerning a party may disclose on the record the basis of the judge's disqualification and may advise the parties and their lawyers that they may consider, out of the presence of the judge, whether to waive disqualification. ...

The Committee believes that a similar analysis applies to the magistrate's sitting on OCS cases in other counties—whether the overall circumstances of his prior employment, in light of the nature of the family proceedings, would affect an objective person's view of the judge's impartiality. For the reasons discussed above, the Committee believes that it would be reasonable for the magistrate to disclose his prior employment in cases involving OCS even in other counties—and for him to do so for a period of two years.

Questions 3 and 4

Canon 4C(3) provides:

A judge may serve as an officer, director, trustee or nonlegal advisor of an . . . educational, religious, charitable, fraternal or civic organization not conducted for profit, subject to the following limitations and the other requirements of this Code.

(a) A judge shall not serve as an officer, director, trustee or nonlegal advisor if it is likely that the organization

(i) will be engaged in proceedings that would ordinarily come before the judge, or

(ii) will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

(b) A judge as an officer, director, trustee or nonlegal advisor, or as a member or otherwise:

(i) may assist such an organization in planning fund-raising and may participate in the management and investment of the organization's funds, but shall not personally participate in the solicitation of funds or other fund-raising activities, except that a judge may solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority;

(ii) may make recommendations to public and private fund-granting organizations on projects and programs concerning the law, the legal system or the administration of justice;

(iii) shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or, except as permitted in Section 4C(3)(b)(i), if the membership solicitation is essentially a fund-raising mechanism;

(iv) shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation.

The Canon is clear that a judge may serve as a member of the board of directors of a nonprofit such as a community theater or as a volunteer for a nonprofit granting wishes for children as long as the organization is not involved with the court as described in subsection (a) and as long as the judge's role is limited as described in subsection (b). From the facts provided to the

Committee, the magistrate judge's proposed involvement appears to meet the requirements of the Canon.


Conclusions

The Committee recommends that a magistrate judge who previously served as staff attorney for OCS should not sit on any case involving parties in cases for which he was the attorney of record during his prior employment. In addition, he should disclose his prior employment in all cases in which OCS appears, even outside the region in which he previously represented OCS, for a period of two years. A magistrate judge may continue to sit on the board of directors of a nonprofit community theater or serve as a volunteer for a nonprofit organization, consistent with Canon 4C(3).


Members of the Judicial Ethics Committee



Eileen Blackwood, Esq., Chair



Hon. Lawrence H. Bruce



Ian Carleton, Esq.

The Hon. Brian J. Grearson and the Hon. Brian Valentine, Magistrate Judge, took no part in the deliberations or decision.

