Key Issues in
Judicial Ethics

ETHICAL ISSUES FOR NEW JUDGES

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INTRODUCTION

Faced with the prospect and privilege of doing justice and administering the law, a new judge must make changes in community activities, political conduct, and financial practices to comply with a new responsibility to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." *Canon 2A, 1990 American Bar Association Model Code of Judicial Conduct.* Moreover, a new judge must make a professional shift from advocate to impartial arbiter.

This paper will outline the advice judicial ethics committees have given to new judges to guide them in making that transition. This paper will begin by listing the inquiries a newly chosen judge should make about charitable, political, and business activities to evaluate what changes are necessary to conform to the judicial ethics rules. It will consider whether a new judge may accept gifts, including receptions, that are offered to mark the new position.

The paper will also discuss winding-up a law practice, including completing pending cases, duties to clients, disposing of an interest in a law firm, receiving fees for work completed before taking the bench, and disassociation from a law firm. Finally, the paper will examine the disqualification issues frequently faced by a new judge.

Unless otherwise indicated, references to the canons of the code of judicial conduct are to the 1990 American Bar Association Model Code of Judicial Conduct. The 1990 model code retained most of the basic principles of the 1972 ABA model code, but made several substantial changes and contains many differences in details. This paper notes any relevant differences between the two model codes. Although the model code is not binding on judges unless it has been adopted in their jurisdiction, 49 states, the United States Judicial Conference, and the District of Columbia have adopted codes of judicial conduct based on either the 1972 or 1990 model codes. (Montana has rules of conduct for judges, but they are not based on either model code.)

Over 40 states and the United States Judicial Conference have judicial ethics advisory committees to which a judge can submit an inquiry regarding the propriety of contemplated future action. The Center for Judicial Ethics has links on its web-site (www.ajs.org/ethics) to advisory committee sites. In eight states, advisory opinions are issued by the judicial discipline commission, but in the other states, the two roles are separate. This paper will refer to a jurisdiction's committee generically as a "judicial ethics committee" or "advisory committee" regardless of the specific title of the committee.

EXTRA-JUDICIAL CONDUCT

Community activities

Even laudable community activities may bias a judge in favor of particular causes or issues, distract a judge from judicial duties, and exploit the judicial office for the benefit of private organizations—or create the appearance of doing so. Therefore, a new judge needs to carefully examine her involvement in charitable and law-related organizations.

In the interim between being chosen and taking the bench, a new judge should ask the following questions and take any steps necessary to comply with the code of judicial conduct:

- Are any of the organizations of which I am an officer or director conducted for profit? (*Canon 4C(3)*)
- Are any of the organizations of which I am an officer or director likely to be engaged in proceedings that would ordinarily come before me? (*Canon 4C(3)(a)*)
- Are any of the organizations of which I am an officer or director engaged frequently in adversary proceedings in the court of which I am a member or in any court subject to the appellate jurisdiction of my court? (*Canon 4C(3)(a)*)
- Does my membership in any organization cast reasonable doubt on my capacity to act impartially as a judge? (*Canon 4A(1)*)
- Will the extent of my activities on behalf of any organization prevent me from properly performing judicial duties? (*Canon 4A(3)*)
- Are any of the government commissions on which I serve concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice? (*Canon 4C(2)*)
- Do any of the organizations to which I belong practice invidious discrimination? (*Canon 2C*)

There is no exception to the canons that allows a new judge to continue prohibited involvement in charitable organizations after taking the bench. *See Arkansas Advisory Opinion 96-10* (new judge may not serve

the rest of her term on the parks and tourism commission); *Texas Advisory Opinion 188* (1996) (new judge may not attend two meetings remaining in her term as a state representative on a national, governmental association). However, the Michigan code of judicial conduct gives a new judge six months to wind up community activities. *See Canon 7D, Michigan Code of Judicial Conduct* (giving a newly elected judge until June 30th following the election and a newly appointed judge six months to resign from organizations and activities).

Even for those organizations with which a judge may properly be involved, a new judge will need to refrain from fund-raising activities in which she may have participated formerly. For example, under Canon 4C(3)(b), a judge may not sign a fund-raising letter or otherwise personally participate in the solicitation of funds or other fund-raising activities for a not-for-profit organization. A new judge should inform the organizations with which she is involved about the new restrictions on her conduct to prevent inadvertent violations of the code. *See U.S. Compendium of Selected Opinions § 8(g)* (2001) (newly appointed judge may accept an award at a fund-raiser shortly after appointment where the arrangements were made before the appointment but should ensure that her name is not used to solicit money).

Political activities

Canon 5A of the model code of judicial conduct substantially restricts a judge's political activities including prohibiting a judge from acting as a leader or holding an office in a political organization, publicly endorsing or opposing a candidate for public office, making speeches on behalf of a political organization, attending political gatherings, soliciting funds for or making a contribution to a political organization or candidate, and purchasing tickets for political party dinners or other functions. The restrictions apply immediately to new judges. *See Arizona Advisory Opinion 93-4* (elected tribal official may not serve the balance of her term after appointment as a justice of the peace); *Illinois Advisory Opinion 99-2* (newly appointed judge may not continue to serve as an elected public school board member); *U.S. Compendium of Selected Opinions § 7.5(h)* (2001) (newly appointed judge should resign political office upon appointment); *U.S. Compendium of Selected Opinions § 8(b)* (2001) (new judge may not continue to hold elected political office beyond the time reasonably needed to arrange her resignation). The restrictions on political activity vary considerably from state to state, may vary within a state depending on whether the judicial office is an appointed one or an elected one, and may even vary from time to time depending on whether a judge is a candidate for re-election. A new judge should carefully examine the specific provisions of his state's code to see what rules apply and take steps to bring his activities into compliance.

Furthermore, some advisory opinions declare that an individual who has been elected or appointed to a judgeship but not yet sworn in to office is bound by the same restrictions on political activity that will govern his conduct after taking office. The South Carolina advisory committee stated that political activity by a person elected or appointed to the bench but not yet sworn in violates the code of judicial conduct. *South Carolina Advisory Opinion 23-1994*. According to other opinions, a judge-elect may not actively participate in a non-judicial campaign before being sworn in to office (*Florida Advisory Opinion 98-25*; *Florida Advisory Opinion 00-16*), and a judge-elect who is vacating a seat in the local legislature should not engage in political activities in support of a candidate in the special election for the seat (*New York Advisory Opinion 98-142*).

Business and financial activities

A new judge should examine her financial activities and withdraw from any that:

- may reasonably be perceived as exploiting her judicial position (*Canon 4D(1)(a)*);
- involve her in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which she serves (*Canon 4D(1)(b)*); or
- will require frequent disqualification (*Canon 4D(4)*).

In addition, to comply with Canon 4D, a new judge will need to resign from any position she holds as an officer, director, manager, general partner, advisor, or employee of a business, other than a family business. *See Massachusetts Advisory Opinion 01-14* (new judge

may not continue to serve on the board of trustees of a savings bank). Many state code provisions on financial activities vary from the model code provisions, and a new judge should review the code in effect in her own state on issues such as engaging in remunerative activity and serving as an officer of a business.

The application section of the model code does allow a judge to continue an otherwise prohibited business activity "for a reasonable period but in no event longer than one year." *See also Canon 7D, Michigan Code of Judicial Conduct* (giving a newly elected judge until June 30th after election and a newly appointed judge six months to divest interests); *South Carolina Advisory Opinion 5-1991* (recently elected judge should divest investment in real estate partnership with former law partner as soon as possible without serious financial detriment).

Finally, in order to ensure compliance with the disqualification provisions in the code, a new judge will need to undertake in the future:

- to keep informed about her personal and fiduciary economic interests (*Canon 3E(2)*);
- to make a reasonable effort to keep informed about the personal economic interests of her spouse and minor children residing in her household (*Canon 3E(2)*); and
- to manage her investments and other financial interest to minimize the number of cases in which she is disqualified (*Canon 4D(4)*).

Fiduciary positions

Under Canon 4E, a new judge will need to resign if he is serving as an executor, trustee, or in a similar fiduciary position for a person other than a member of his family, but he may continue to serve "for that period of time necessary to avoid serious adverse consequences to the beneficiary of the fiduciary relationship" although in no event longer than one year. *Commentary to Application Section F.* For example, the Georgia advisory committee stated that a newly elected judge need not resign as trustee prior to taking office. *Georgia Advisory Opinion 51* (1982). However, the judge would need to resign as soon as reasonably possible, the committee advised, and could not simply continue to serve until the trust ran its course even if little activity was required on the trustee's part and explaining the change to the beneficiary would cause some problems. *See also New York Advisory Opinion 95-39* (recently elected judge who had been the conservator for an incompetent may, as a matter of necessity, continue to perform essential services but must move promptly for the appointment of a substitute); *South Carolina Advisory Opinion 21-2000* (new judge may serve as attorney in fact only for the time necessary to avoid serious adverse consequences to the beneficiary of the fiduciary relationship and in no event longer than one year).

GIFTS AND RECEPTIONS FOR NEW JUDGES

A new judge may accept gifts from former clients, close friends, colleagues, or a bar association to mark her investiture. Acceptance of such a gift may necessitate the judge's recusal from matters involving the donor, but "in many instances, the donors are likely to be persons whose appearance in a case would in any event necessitate the judge's recusal, at least for some period of time." *U.S. Advisory Opinion 98* (2000). The federal advisory committee stated that if a group gives a gift and the cost is shared proportionately, recusal may not be required for each donor if the amount of each individual contribution is relatively small. Of course, a new judge may not solicit gifts.

Advisory committees have allowed new judges to accept:

- a robe from a bar association to which the judge belongs (*Arkansas Advisory Opinion 00-10*);
- a gavel from a former employer (*Florida Advisory Opinion 76-22*);
- a gavel and a $500 gift from a former client (*U.S. Compendium of Selected Opinions § 5.4-2(a)* (2001));
- a gavel from a local bar association (*U.S. Compendium of Selected Opinions § 5.4-2(b)* (2001));
- gifts of $10 or less toward a robe to be presented at investiture from former colleagues and friends (*U.S. Compendium of Selected Opinions § 5.4-2(e)* (2001)); and
- a judicial robe, clock, chair, gavel, or money from a former law firm or corporate employer, former clients, close friends, colleagues, or a bar association (*U.S. Advisory Opinion 98* (2000)).

But see New Jersey Advisory Opinion 4-02 (newly confirmed judge may not accept a gift from her law firm in the form of a trip with a value of approximately $5,000).

Further, a new judge may allow her former law firm to sponsor and pay the expenses for a reception following her investiture. *Florida Advisory Opinion 99-3*; *Illinois Advisory Opinion 01-11; Washington Advisory Opinion 95-5*; *U.S. Advisory Opinion 98* (2000). Other groups, such as a bar association, client, corporation, or chamber of commerce, may also sponsor a reception for a new judge. *See Florida Advisory Opinion 99-3* (attorneys in a new judge's community may sponsor and pay expenses for a reception one week after her investiture); *U.S. Advisory Opinion 98* (2000) (new judge may accept the offer of a reception in her honor from a corporate employer, a business client, a colleague, or a bar association); *U.S. Compendium of Selected Opinions § 5.4-2(b)* (2001) (new judge may accept a contribution toward the cost of a reception from a local bar association on the occasion of her investiture). *But see New Jersey Advisory Opinion 3-01* (new judge may not accept a check from the county bar association toward the cost of a swearing-in reception).

Some committees, however, have imposed conditions on sponsorship. For example, the Illinois committee stated that a judge may be feted at a post-investiture party sponsored by her former law firm only if the party is not intended to advance the interests or status of the law firm. *Illinois Advisory Opinion 01-11.* The committee also warned the judge to be concerned about the magnitude or extravagance of the celebration and the number and nature of those invited. The Washington advisory committee instructed a new judge to report as a gift the expense of a reception hosted by her former law firm following her swearing-in ceremony. *Washington Advisory Opinion 95-5*.

Moreover, the advisory committee for federal judges warned that a new judge may not accept either a gift or a reception from a for-profit company that has no pre-existing or long-standing relationship with the judge or from an organization that is publicly identified with controversial legal, social, or political positions or that regularly engages in adversary proceedings in the federal courts. *U.S. Advisory Opinion 98* (2000).

WINDING-UP A LAW PRACTICE

Practicing law after being chosen as a judge

Canon 4G prohibits a judge from practicing law, but a newly chosen judge may continue to actively practice law during any period after he is elected or appointed but before he takes office. In that interim period, a newly chosen judge may:

- practice before all courts including the court to which he has been chosen;
- handle both criminal and civil cases;
- work on cases that are almost ready for trial;
- appear as trial counsel for clients;
- appear in either a jury trial or a non-jury proceeding; and
- be compensated according to a partnership or employment agreement.

Arkansas Advisory Opinion 96-9; *Florida Advisory Opinion 88-29*; *Florida Advisory Opinion 00-39; Georgia Advisory Opinion 217* (1996); *New York Advisory Opinion 94-30; New York Advisory Opinion 98-92*. *See also Delaware Advisory Opinion 92-5* (attorney may continue to practice in court after his name has been submitted to the senate for confirmation as judge but should promptly wind up cases); *Kansas Advisory Opinion JE-11* (1984) (after an attorney has been elected judge, his former law firm can continue to use its current letterhead until he takes office).

This rule extends to a prosecuting attorney newly chosen to be a judge. Thus, the Florida judicial ethics committee stated that an assistant state's attorney may continue to try cases in the circuit court after being elected to the office of circuit judge and need not resign until he actually assumes judicial office. *Florida Advisory Opinion 74-13*. *See also Arkansas Advisory Opinion 96-5* (deputy prosecuting attorney who has been nominated for a judicial seat in the same district and who is unopposed may continue to prosecute cases until he takes office). However, the Florida committee also advised that a chief assistant state's attorney who is a judge-elect should immediately relinquish any administrative or supervisory control over felony attorneys who appear in the court in which the judge will sit and should appear only in misdemeanor cases or in felony cases in another geographic area of the circuit. *Florida Advisory Opinion 84-21*. Moreover, the Kentucky advisory committee suggested that a judge-elect should resign as assistant county attorney in order to minimize the problems of disqualification. *Kentucky Advisory Opinion JE-32* (1981).

Completing pending cases

There is no exception in the model code to the prohibition on practicing law that allows a new judge to wind-up pending cases after taking office. *Arizona Advisory Opinion 00-7.* Thus, after judicial office is assumed, the prohibition applies immediately:

- even to representation that requires no court appearances (*Florida Advisory Opinion 83-3* (real estate closing); *New York Advisory Opinion 89-38* (closing out an estate));
- even if the work could be performed in the evenings and would be primarily ministerial (*New York Advisory Opinion 89-38* (closing out an estate)); and
- even if opposing counsel has no objection (*Florida Advisory Opinion 77-2* (oral argument)).

See also Canon 4G, South Carolina Code of Judicial Conduct (prohibition on practicing law "becomes effective immediately upon taking the oath of office and applies to any case in the judge's former practice that was not completed when judicial duties were assumed"); *Compliance section, North Carolina Code of Judicial Conduct* ("it shall be permissible for a newly installed judge to facilitate or assist in the transfer of his prior duties as legal counsel but he may not be compensated therefore"). *But see Canon 4G, Tennessee Code of Judicial Conduct* ("A newly elected or appointed judge can practice law only in an effort to wind up his or her practice ceasing to practice law as soon as reasonably possible and in no event longer than 180 days after assuming office").

In discipline cases, courts have rejected judges' attempts to rely on a winding-up exception to excuse their practice of law. The New York Court of Appeals removed a judge from office for improperly continuing to act as a fiduciary in several estates, continuing

to perform business or legal services for clients, and maintaining an inappropriate business and financial relationship with his former law firm, which had an active practice before his court. *In the Matter of Moynihan*, 604 N.E.2d 136 (New York 1992). The judge had claimed that his actions were necessary to wind-up a busy practice with long-standing responsibilities to clients concerning estate matters that could not readily be transferred. The court considered that defense, although it did not expressly hold that a new judge was allowed to wind-up cases after taking the bench. However, the court found that the two years the judge had continued to provide services after assuming the bench was "an inexcusably long period," noting that the work involved matters that came before the judge's own court (albeit before different judges). The judge had also contended that the tasks he continued to perform, including filling out tax returns, banking activities, expediting stock transfers, and administering an estate, were purely "ministerial" acts that did not conflict with his judicial responsibilities. The court held that to the extent the acts were ministerial, there was no justification for his failure to turn them over to another attorney. *See also In the Matter of Intemann*, Determination (New York Commission on Judicial Conduct October 25, 1988) (www.sjc.state.ny.us/Determinations/I/intemann.htm) (judge was removed for, among other misconduct, continuing to provide legal services for three estates).

Similarly, rejecting a judge's argument that he had interpreted Canon 4G in good faith to allow him to finish his law practice by performing clerical activities after he took office, the Arkansas Supreme Court concluded that the work the judge had performed was more than ministerial or clerical and constituted the active practice of law. *Judicial Discipline and Disability Commission v. Thompson*, 16 S.W.3d 212 (Arkansas 2000). In one case, the judge had met with clients in his chambers to discuss a settlement, accompanied the clients when they negotiated the settlement check, faxed a letter to co-counsel confirming their fee arrangement, and sent co-counsel a cashier's check with a letter, written on his judicial stationery, directing her to approve the order of dismissal and giving her directions on closing the case. In a second case, the judge had participated in several depositions and exchanged legal correspondence and documents with opposing counsel and the court clerk regarding settlement.

Two judges received advisory letters from the California Commission on Judicial Performance for failing to ensure that they were no longer counsel of record in cases after taking the bench. *California Commission on Judicial Performance 1998 Annual Report*, at 29. One judge remained counsel of record in a number of cases, and the second remained counsel of record in one case for a lengthy period after taking the bench. *See also In re Ryman*, 232 N.W.2d 178 (Michigan 1975) (removal for, among other misconduct, maintaining an office and furnishing legal services to former clients after assuming office); *In re the Matter of Slusher*, Stipulation and Agreement (Washington Commission on Judicial Conduct April 3, 1992) (public admonishment for attempting to secure funds for former client by communicating with attorney for the other party). *But see In re Ryman*, 232 N.W.2d 178 (Michigan 1975) (Levin, J., concurring in part and dissenting in part) (advocating limited winding-up exception if judge does not appear in court or receive compensation).

Quasi-judicial responsibilities. Several opinions suggest that a judge may finish ministerial duties related to serving, for example, as an arbitrator or referee after resuming judicial duties.

For example, despite the prohibition on a judge acting as an arbitrator in Canon 4F, the West Virginia judicial ethics committee stated that a new judge could continue to serve as an arbitrator in a matter in which the decision only needed to be finalized. *West Virginia Advisory Opinion* (August 18, 1995). The committee noted that resolution of the case would be significantly delayed and lead to great additional expense if the new judge were not permitted to render a decision. In a second opinion, the committee stated that a new judge who had been a member of a lawyer disciplinary board hearing panel could sign a final order that had been accepted prior to his becoming a judge but had not been ready for signature. *West Virginia Advisory Opinion* (February 5, 1997). *See also New York Advisory Opinion 96-89* (judge may execute referee's deed arising out of a determination the judge made as a referee prior to assuming bench).

Duties to clients

The ethical responsibilities owed to a client when an attorney leaves the practice of law to become a judge are no different than those owed when an attorney ends representation of a client for any other reason and are covered by each state's rules of professional responsibility. Thus, a new judge should consult her state's rules and law on the issue. *See also ABA/BNA Lawyers Manual on Professional Conduct*, 91:801, "Duties at End of Representation."

Rule 1.16(d) of the ABA Model Rules of Professional Responsibility requires a lawyer when ending representation to "take steps to the extent reasonably practicable to protect a client's interests." Specific steps a new judge should take include:

- promptly contacting all clients regarding the change in professional status to give reasonable notice and allow time for employment of other counsel;
- discussing with the client the options available for obtaining counsel if the matter cannot be concluded prior to the attorney becoming a judge; and
- assisting the client in locating counsel with the necessary expertise.

Pennsylvania Bar Advisory Opinion 88-252. The choice of new counsel, however, must be left to the client, and a new judge cannot unilaterally transfer a client file to another lawyer without the client's consent. *Michigan Advisory Opinion JI-89* (1994). The Kansas judicial ethics committee stated that an attorney who is becoming a judge may not suggest or recommend the services of any particular lawyer. *Kansas Advisory Opinion JE-11* (1984).

In response to an inquiry from a judge who planned to refer pending contingency fee cases to an attorney while retaining a percentage of the ultimate award, the South Carolina advisory committee advised the judge to fully disclose all material facts to the client and receive the client's consent to the participation of the new lawyer and to the fee agreement. *South Carolina Advisory Opinion 21-1998*. Furthermore, in winding-up a law practice, a lawyer who has become a judge must return to the client files, property, and any part of a yearly retainer fee not earned. *Illinois Advisory Opinion 94-12.*

A newly elected judge must make clear to a client that the judge can no longer represent the client in any way after being sworn in, including advising the client or consulting about continuing cases and prior work. *South Carolina Advisory Opinion 21-1998.* Advisory opinions, however, indicate that a judge may provide information to a former client as part of the continuing duty to protect a client's interests upon conclusion of representation.

For example, the Illinois judicial ethics committee advised that a judge may provide a successor attorney with information regarding a case the judge had tried as a state's attorney that was about to be retried, but that the judge could not give legal advice. *Illinois Advisory Opinion 94-19*. Emphasizing that "providing information is not the same as providing advice on matters such as trial strategy," the committee explained:

> Given the circumstances presented, cooperation, in the interest of proper administration of justice, should not be discouraged. A judge has a duty to his former client, in this case the State, just as he or she would to any other client, to provide information to the new lawyer regarding the case. The judge, however, must be careful not to give current advice to the new attorney as he or she would then be violating [the rule that] precludes a judge from practicing law.

Similarly, the Nevada advisory committee stated that a judge could provide a written, verbatim transcription of her otherwise illegible notes prepared during her service as prosecutor in a case as long as she did not discuss the notes, transcription, or any other matter with the current prosecutor. *Nevada Advisory Opinion 98-3*. The committee also cautioned that the judge may not assist or advise the current prosecutor in preparing for a new sentencing hearing in the case.

The advisory committee for federal judges also warned that a judge who prosecuted a case before appointment may not actively assist former colleagues in the appeal or render advice, counsel, or opinions about legal issues or the conduct of the appeal. *U.S. Compendium of Selected Opinions § 2.7(g)* (2001). However, the committee allowed the judge to respond to questions from successor counsel as to historical facts not readily apparent from the file, the factual details within the judge's peculiar knowledge, and similar matters of clarification. *New York Advisory Opinion 96-128* (judge may provide an affidavit regarding the facts surrounding her decision as district attorney to dis-

miss criminal charges against a suspect who has now filed a suit for false arrest); *New York Advisory Opinion 95-20* (judge may review a file and provide information to the successor prosecutor about a case previously handled by the judge as a prosecutor where the judge may be called as a witness in the retrial).

Analogous advice has been given to judges with respect to their former representation of criminal defendants. For example, the Massachusetts advisory committee stated that a judge could sign a true and accurate affidavit regarding her percipient knowledge of events material to a former client's new trial motion, which was based on an alleged conflict of interest arising out of the judge's former office-sharing arrangement with a lawyer who had represented a police officer who had testified against the former client. *Massachusetts Advisory Opinion 01-2.* Similarly, the New York judicial ethics committee advised that a judge may answer inquiries from a former client about factual information that might be useful to the client's potential motion to vacate a conviction. *New York Advisory Opinion 95-116.* The client wanted to learn whether the judge's recollection of events and the contents of her closed files might support the contention that the prosecutor had failed to make a required disclosure. *But see Florida Advisory Opinion 99-4* (judge may not execute an affidavit explaining why she took certain steps while she represented a former client and commenting on the former client's good character if the affidavit is to be submitted to a prosecutor to help resolve criminal charges of workers' compensation fraud).

Finally, judges have been counseled that they may provide factual information but not legal advice regarding non-criminal representation. For example, the New York committee stated that a judge who served as the attorney for an estate may furnish an affidavit detailing what services were rendered on what dates, the amount of time expended, and similar details as requested by the estate's current attorney to comply with an order of the judge presiding over the case. *New York Advisory Opinion 96-128.* Similarly, the committee stated that a judge may issue a declaration about the facts and circumstances involved in an employment agreement that she had negotiated more than 25 years earlier while in private practice to be submitted in a dispute in another state. *New York Advisory Opinion 91-137.*

Disposing of an interest in a law practice

Any disposition of a new judge's interest in a law practice must strictly comply with the rules of professional responsibility. *See ABA/BNA Lawyers Manual on Professional Conduct*, 91:801, "Sale and Merger."

A judge may not share in the profits a firm earns after the judge's departure. *Nebraska Advisory Opinion 89-1*; *U.S. Advisory Opinion 24* (revised 1998). Furthermore, a judge must divest all financial interest in a professional legal association upon taking the bench. The Nebraska ethics advisory committee explained the dangers of a new judge remaining a shareholder in a professional corporation.

- Third parties would be likely to conclude that the new judge "is still engaged in the practice of law, still making strategic decisions concerning the cases which are still pending…."
- The judge's impartiality could be subject to question "were the judge to preside over cases of a like or similar nature to those residual cases which the professional corporation is still handling."
- "[T]he devotion of the judge to judicial duties and the minimization of the conflict between those judicial duties and extra-judicial activities would be jeopardized…."

Nebraska Advisory Opinion 97-2. See also Ohio Advisory Opinion 89-17 (judge may not retain stock ownership in a law firm even if he would receive no income); *Texas Advisory Opinion 129* (1989) (new judge should not continue to own, or receive salary from, a corporation whose only purpose is the practice of law). *Compare New York Advisory Opinion 97-9* (recently appointed judge may remain a shareholder of the professional corporation through which he practiced law solely to wind-up its affairs (including collection of fees earned and payment of debts accrued prior to his appointment) but must dissolve the corporation as soon as practicable after assuming office) *with Massachusetts Advisory Opinion 98-14* (judge may not maintain in existence the professional corporation through which he practiced law).

The issue whether a judge may retain his interest in a law firm if that interest is placed in a blind trust has been resolved differently by different advisory committees. Approving such an arrangement, the Nebraska

judicial ethics committee advised that a judge who is the sole shareholder of a professional corporation that employs several attorneys may place his shares in a blind trust or similar arrangement under which the judge could have "absolutely no participation or input into the affairs of the professional corporation," with the exception of receiving fees for legal services previously rendered. *Nebraska Advisory Opinion 97-2*. In contrast, the Ohio advisory committee disapproved an arrangement in which a trust would have been created for a new judge who had been a professional association's majority shareholder even if the new judge would have no control over the trustee's decisions and receive no income from the association. *Ohio Advisory Opinion 89-17*.

A new judge may receive a lump sum payment for his interest in a practice based on its present value *Florida Advisory Opinion 96-26*. *See also U.S. Compendium of Selected Opinions § 3.3-1(b-1)* (2001) (judge may negotiate for prepayment of a fixed amount in lieu of collecting accounts payable from a former law firm as they become due in future years).

Moreover, most jurisdictions allow a new judge to receive installment payments over a period of time, rather than one lump sum payment when leaving a law practice. For example, the Georgia judicial ethics committee stated that a newly appointed judge may arrange a deferred payment plan for his interest in a former law partnership. *Georgia Advisory Opinion 16* (1977). The committee reasoned it would be unfair and unrealistic in many instances to expect the remaining partners to pay cash for the judge's interest. The committee cautioned that the new judge and the former partners should maintain minimal contact, the term of payment should be as short as possible, and the interest should be at fair market value. *See also Florida Advisory Opinion 03-2* (new judge may receive periodic payments from his former law firm for his equity interest in the firm or, in the alternative, the firm may execute a note to pay the balance owed the judge).

Canon 4I(2) of the Maryland code of judicial conduct specifically allows a new judge to receive over a reasonable period one or more payments representing the liquidated value of his interest in a former practice. However, the canon requires a newly chosen judge to submit the payment agreement to the judicial ethics committee prior to qualification for judicial office for review as to the reasonableness of the time provided for payments. The code specifies that a "payment period limited to a maximum of five years or less is presumptively reasonable," but that a "longer payment period is permitted only with the Committee's prior approval as to reasonableness."

The Massachusetts judicial ethics committee advised that a lawyer about to become a new judge may enter into an agreement with his firm pursuant to which the firm will pay him a fixed amount at a reasonable rate of interest in installments over 10 years. *Massachusetts Advisory Opinion 00-1*. However, the committee cautioned that if the judge believes the payments will become the sole reason for disqualification in less than 10 years, he should attempt to shorten the payout term. *See also Alabama Advisory Opinion 86-248* (approving an agreement under which a judge would share law partnership profits earned but not paid prior to his assuming the bench for the approximately one year it would take to complete all financial settlements); *Alabama Advisory Opinion 89-351* (approving an agreement under which a judge's former partner would execute a promissory note evidencing deferred compensation to come due almost two years later); *Nebraska Advisory Opinion 89-1* (approving termination agreement under which a judge would obtain a secured promissory note and a payment schedule from a former partner); *West Virginia Advisory Opinion* (January 16, 2001) (approving a purchase agreement under which a judge would receive intermitent payments from his former law firm for an extended period); *U.S. Advisory Opinion 24* (revised 1998) (approving termination agreement under which a judge would be paid for his interest in a firm over a period of years). *See also Michigan Advisory Opinion JI-118* (1998) (judge may transfer contract with lawyer for sale of practice on installment basis to another law firm that will pay balance due judge on original contract in one lump sum).

In contrast, the Kentucky committee stated that a new judge cannot sell the tangible assets of a law practice on an installment plan. *Kentucky Advisory Opinion JE-9*. Such an arrangement, the committee concluded, would involve the judge in "frequent transactions" with an attorney, which are prohibited by Canon 4D(1)(b). The committee suggested that the partner negotiate a bank loan to pay the judge in full.

Fees—hourly cases

A new judge may receive legal fees earned prior to becoming a judge or a proportionate share of fees earned by a professional association prior to her leaving the firm. (Whether a judge may hear cases involving a former firm if the firm is still paying the judge for fees earned before becoming a judge is discussed at pages 18-19.) For example, the Kentucky committee stated that a judge may receive compensation for work that she did before going on the bench even if the representation was not completed by that time and may share in fees collected in the future as long as the work was done before she left the firm. *Kentucky Advisory Opinion JE-41* (1982). The committee noted that the rule applies "to a solo practitioner, salaried associate of a firm, and to a partner who receives a given percentage of the firm's fees." *Accord Alabama Advisory Opinion 81-114; Alabama Advisory Opinion 84-215*; *Florida Advisory Opinion 76-1*; *Florida Advisory Opinion 81-11*; *Florida Advisory Opinion 82-7*; *Florida Advisory Opinion 86-7*; *Florida Advisory Opinion 93-38*; *Georgia Advisory Opinion 12* (1977); *Illinois Advisory Opinion 94-12*; *Maryland Advisory Opinion 23* (1974); *Nebraska Advisory Opinion 89-1*; *New York Advisory Opinion 88-118; New York Advisory Opinion 89-134*; *New York Advisory Opinion 90-203*; *West Virginia Advisory Opinion* (December 18, 2000).

Advisory committees have attached several conditions to a judge's receipt of fees earned before taking the bench.

- The amount owed to the judge should be settled prior to her assuming the bench insofar as possible. *Alabama Advisory Opinion 81-114; Alabama Advisory Opinion 84-215 ; Alabama Advisory Opinion 98-699; Arkansas Advisory Opinion 96-9*.
- The amount must be fixed with reference to work that was performed before the attorney became a judge. *Arkansas Advisory Opinion 96-9; Florida Advisory Opinion 86-7*; *Georgia Advisory Opinion 12* (1977); *Kentucky Advisory Opinion JE-41* (1982).
- The judge must not receive any part of a fee collected in connection with matters that were not pending with the firm at the time she left or generated by clients on matters that arose afterwards. *Florida Advisory Opinion 86-7*; *Georgia Advisory Opinion 12* (1977).
- The fee must be computed based on traditional standards. *Florida Advisory Opinion 91-8*.
- The fee should be in accordance with the rules of professional conduct. *Florida Advisory Opinion 97-9; Florida Advisory Opinion 94-7; Kentucky Advisory Opinion JE-41* (1982).
- Full disclosure should be made to the client. *Kentucky Advisory Opinion JE-41* (1982).

To collect fees, a new judge may forward periodic bills to former clients for outstanding balances due for services rendered prior to becoming a judge and may maintain a business operating account. *New York Advisory Opinion 95-12*.

Fees—contingency matters

After taking office, a judge may receive payment for work done on contingency fee lawsuits that were pending at the time he stopped practicing law. (Whether a judge may hear cases involving a former firm if the firm is still paying the judge for fees earned before becoming a judge is discussed at pages 18-19.) For example, the Arkansas judicial ethics committee advised that a new judge and the firm he is leaving should evaluate contingency fee matters as of the time of departure based on the likelihood of success, the likely recovery, and the amount of work already performed in light of the underlying principle that compensation to the judge cannot be based on work performed after departure. *Arkansas Advisory Opinion 96-9*. The payment to the departing attorney/new judge, the committee stated, may be in a lump sum or in installment payments that end at the earliest practicable date, ideally within a few months.

Such arrangements are also appropriate when the payment is being made by an individual attorney to whom the judge transferred cases. For example, the Georgia committee approved a fee arrangement under which a new judge and the attorney furnishing legal services to the judge's former clients would divide fees received in contingency fee cases according to a schedule based on services already performed and estimated future services. *Georgia Advisory Opinion 35* (1979). Similarly, the West Virginia advisory committee stated that a judge could collect contingency fees in cases

handled prior to becoming a judge under arrangements made with another attorney to assume the cases if the arrangements were in writing and set forth a definite percentage for the fees and the client knows of the arrangement. *West Virginia Advisory Opinion* (December 18, 2000). The Michigan advisory committee stated that a new judge may agree to discount the fees due him in a cash-out price with the attorney who purchases his practice or to whom the judge referred a contingency fee case. *Michigan Advisory Opinion CI-1079* (1985).

That rule has several provisos.

- The percentage the judge receives must reasonably reflect the amount of work he did on the case. *Arkansas Advisory Opinion 96-9; Florida Advisory Opinion 97-9; Kansas Advisory Opinion JE-68* (1996); *Michigan Advisory Opinion CI-1079* (1985); *Missouri Advisory Opinion 62* (1981); *South Carolina Advisory Opinion 21-1998; South Dakota Advisory Opinion 91-3*; *U.S. Compendium of Selected Opinions §2.7(b)* (2001).
- The judge and the attorney or firm must agree to a fixed percentage at the time the judge stops working on the case to assume the bench. *Alabama Advisory Opinion 97-659; Arkansas Advisory Opinion 96-9; Missouri Advisory Opinion 62* (1981); *South Carolina Advisory Opinion 21-1998; West Virginia Advisory Opinion* (September 28, 1998); *U.S. Compendium of Selected Opinions §2.7(b)* (2001).
- The contingency fee arrangement must otherwise be proper under the rules of professional conduct. *Florida Advisory Opinion 98-20; New York Advisory Opinion 93-44* .
- The computation must be based on traditional standards. *Florida Advisory Opinion 97-9*.

However, the judicial ethics committee for federal judges advised that, while a new judge may agree to share in future fees from contingency fee cases, the judge should first attempt to reach an agreement with his former partners on a fixed sum. *U.S. Compendium of Selected Opinions §2.7(b-1)* (2001). The South Carolina committee suggested that an agreement to receive a percentage of any awards in contingency fee cases might constitute a financial interest requiring frequent disqualification that a new judge should divest as soon as he can do so without serious financial detriment as required by Canon 4D(4). *South Carolina Advisory Opinion 21-1998*. The committee stated that whether divestment was required was a fact-sensitive determination that depended on the attorney to whom the cases were referred and the litigants in the cases.

Referral fees

Several advisory committees have stated that a judge may receive a fee for a referral made before becoming a judge if the fee is based entirely on the referral without any provision of legal services. *Illinois Advisory Opinion 94-16. See also Texas Advisory Opinion 49* (1980). However, noting that a referring attorney retains legal responsibility for the case under the rules of professional responsibility, the Illinois committee cautioned that ethical and financial considerations may make it desirable, although not mandatory, for a judge to seek the client's consent to eliminate his continuing legal responsibility by rescinding or modifying the fee-sharing agreement in return for relinquishment of his share of the fees.

After becoming a judge, a judge may not tell persons who ask the judge to represent them that he no longer practices law but that they could get good representation at his former firm, regardless whether the judge would receive a referral fee; the judge may refer the person to the bar association or to any other appropriate referral agency. *Arkansas Advisory Opinion 96-9. See also Kansas Advisory Opinion JE-71* (1996) (judge who served as guardian ad litem for a minor may not refer the minor's claim for personal injuries to a lawyer and claim a referral fee where the claim was first recognized after the judge took the bench).

Disassociation from a firm

Except for payment of fees or for the judge's interest in the practice, "[u]pon assuming judicial office, a judge is required to sever all ties with the judge's former firm." *Michigan Advisory Opinion JI-89* (1994).

As part of that process, a new judge must ensure that her name is deleted from the firm name and not used in professional notices sent out by the firm. *See Kentucky Advisory Opinion JE-41* (1982); *Louisiana Advisory Opinion 155* (1999); *Michigan Advisory Opinion JI-89* (1994); *New York Advisory Opinion 89-136*.

For example, the Massachusetts judicial ethics committee stated that a judge has an obligation to notify members of her former law firm that she objects to the use of her name and title in a brochure that the firm is preparing for distribution to the firm's clients and prospective clients. *Massachusetts Advisory Opinion 90-1.*

That change to the firm name is required by the Canon 2B provision that a judge "shall not lend the prestige of office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge." The removal of the judge's name from a law firm name is also required by Rule 7.5 of the model rules of professional responsibility, which states that the "name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm."

However, if a judge's former firm refuses to remove the judge's name from the firm name, the judge is not required to take action to force it to do so. *Massachusetts Advisory Opinion 03-9* (judge whose former firm has refused requests to remove the judge's surname from the firm name may file a complaint with the board of bar overseers but is not required to do so); *U.S. Compendium of Advisory Opinions § 2.7(g)* (2001) (judge should not permit a former law firm to continue to use the judge's name but need not take steps to compel an immediate change if the firm plans to remove the judge's name that year).

Several advisory committees have disapproved a new judge's continued use of the premises of a former firm. A new judge had requested the Michigan committee for permission to use the library in the office of her former firm for research and opinion writing. *Michigan Advisory Opinion JI-89* (1994). The committee stated:

> Regular and continuing contacts with the judge's former firm raise an appearance of bias and presents opportunities for others to improperly influence the judge's judicial judgment. It is one thing for a judge to request a local firm to share reference materials on occasion when needed, and quite another issue for the judge to utilize the assets of the judge's former firm on a regular basis. Such on-going contact and access to a private law practice raises questions regarding judicial impropriety…and opens the door to possible leaks of client confidences and secrets….

Similarly, the Pennsylvania bar committee stated that a newly elected judge may not use a law office as temporary quarters for conducting judicial business until the county makes other facilities available. *Pennsylvania Bar Advisory Opinion 87-69. Cf., South Carolina Advisory Opinion 23-1995* (judge may share office building with her former law partner where the judge can enter her second-floor office without entering her former partner's office and there would be no access between the two offices).

Whether a new judge may retain her retirement account in a former firm's plan depends on a number of factors. The U.S. committee advised that a judge should remove her retirement account from her former law firm's profit-sharing trust where members of the firm appeared regularly in federal court in the judge's district and her participation would require disqualification from their cases. *U.S. Compendium of Selected Opinions §5.2-4(a)* (2001). *But see U.S. Compendium of Selected Opinions §5.2-4(b-1)* (2001) (judge may retain interest in former firm's pension fund because recusal would be required in any event where judge's spouse is a partner in the firm). The Alabama judicial ethics committee stated that a judge may leave accumulated funds in the retirement plan set up by her old law firm if the judge sets up a subaccount for which she pays the management fee and into which the firm makes no further contributions on her behalf. *Alabama Advisory Opinion 91-417. See also Alabama Advisory Opinion 95-583* (judge should withdraw the accumulated amount in a profit-sharing account with a former law firm and should not continue to receive earnings on the investments where a three-person executive committee from the firm directs how funds will be invested). The Minnesota advisory committee stated that, if a pension and profit-sharing account cannot be transferred without substantial loss and there is no reasonable alternative, a recently appointed judge may maintain such an account with her former law firm for a reasonable time not to exceed three years. *Minnesota Board on Judicial Standards 2001 Annual Report*, at 15.

Special circumstances may allow a limited, continuing association between a new judge and a former firm. *See Illinois Advisory Opinion 96-9* (judge may agree to remain liable on an extension of the lease of her former partnership, which will allow the partnership to avoid an increase in rent, even though the agreement will extend the judge's connection to the firm for three years); *Illinois Advisory Opinion 98-8* (judge

appointed to vacancy need not require former law firm to remove her name from its name if the judge must run for election in less than a year and is facing strong opposition, but should require that her individual name be removed from the firm letterhead or office listing; if the judge is successful in the election, the judge should immediately take steps to have her surname removed from the firm name); *Massachusetts Advisory Opinion 01-13* (judge may accept from her former employer indemnification for legal fees and expenses she might incur providing testimony in a pending matter in which her former employer is a party).

DISQUALIFICATION ISSUES FACED BY NEW JUDGES

Although even many years after leaving the practice of law a judge may be faced with a question of disqualification due to the appearance of a former client or former colleague, the less time separating the judge from the former relationship, the more the judge's partiality may be questioned, and, therefore, the issue is particularly acute for a new judge.

Matter in controversy

Canon 3E(1)(b) requires disqualification where "the judge served as a lawyer in the matter in controversy." The canon's use of "matter," rather than "case," indicates that a judge is disqualified not only from a specific case in which he appeared on behalf of a party but in any litigation that is in any way related to former representation of a client. The disqualification "extends beyond the particular case to other cases involving the same matter or arising from the same fact situation in which he previously served as an attorney" (*Alabama Advisory Opinion 95-547*)), applies no matter how long ago the representation ended (*U.S. Compendium of Selected Opinions §3.6-5(a)* (2001)), and includes situations where the judge only gave legal advice regardless of the amount of advice (*Alabama Advisory Opinion 95-547*; *Michigan Advisory Opinion CI-1079* (1985)).

Thus, to evaluate disqualification under Canon 3E(1)(b), a new judge must ask whether a case pending before him as a judge is related to earlier representation he provided as an attorney. For example, the Alabama Supreme Court held that a judge was disqualified from a civil case in which a police officer sued the city for injuries incurred while making an arrest because the judge, a former prosecutor, had prosecuted the officer for the death of the person arrested. *Rushing v. City of Georgiana*, 361 So. 2d 11 (Alabama 1978). The court explained:

> It cannot be doubted that, with the exception of possible personal injuries claimed by [the officer] in his civil action, the same course of events is relevant to both cases. The facts leading up to the shooting, the facts concerning the performance, or non-performance of duty, the relative use of force, all these would be relevant in each case.

Similarly, the Maryland Court of Appeals held that a judge should have recused himself from a zoning case involving a private airstrip because 17 years earlier, while an attorney, the judge had drafted the restrictive covenants that created the airstrip. *Sharp v. Maryland*, 607 A.2d 545 (Maryland 1992). The court stated that, when an attorney has given legal advice or performed legal work in a non-adversarial setting, recusal is required if the underlying purpose of the prior representation was to achieve the goal that is at issue in a later proceeding before the same attorney as a judge.

Advisory opinions provide additional examples applying this rule.

- A judge who represented a husband eight years earlier in proceedings that led to the civil commitment of his wife on grounds of mental incompetency is disqualified from divorce proceedings in which the husband is attacking his wife's mental stability to try to show that she is unfit to have custody of their minor child. *Alabama Advisory Opinion 93-478.*
- A judge is disqualified from a divorce and custody action when the judge, as an attorney several years earlier, had advised the husband concerning the return of his estranged wife and children to the state. *Alabama Advisory Opinion 83-197.*
- A judge is disqualified from a proceeding challenging the disposition of a decedent's estate where he served as a guardian ad litem for an accounting in a previous proceeding involving the estate. *Alabama Advisory Opinion 86-285.*
- A judge is disqualified from a case involving a provision of a will on which he gave a legal opinion while an attorney. *Alabama Advisory Opinion 96-620.*
- A judge who represented a murder victim's mother in an action to obtain custody of her grandchild may not hear a case in which the child's father is charged with murdering the child's mother. *Alabama Advisory Opinion 02-805.*
- A judge must recuse from a case in which a landowner has sued an electric co-operative for trespass where the judge represented the landowner in the acquisition of the property and has personal knowledge that the co-op maintained a power line across the property. *New Mexico Advisory Opinion 87-7.*

See also Missouri Advisory Opinion 24A (1981) (judge should advise legatees and heirs that he prepared a will presented to him for probate and should recuse if requested); *West Virginia Advisory Opinion* (August 10, 1994) (judge is disqualified from cases involving individuals for whom he had been a guardian ad litem). *But see Alabama Advisory Opinion 96-626* (judge is not disqualified from a proceeding for modification of custody where one of the parties had asked the judge to represent him in the original divorce proceeding but the judge declined).

Former clients

If a case is unrelated to earlier representation, the model code of judicial conduct does not specifically address whether a judge is disqualified when a former client is a party.

Several states, however, have rules that require disqualification when a former client appears within a specific period. *See Rule 63C(1)(c), Illinois Code of Judicial Conduct* (judge is disqualified "for a period of seven years following the last date on which the judge represented any party to the controversy while the judge was an attorney engaged in the private practice of law"); *Rule 2.003(B)(4), Michigan Rules of Court* (judge is disqualified if the judge was an attorney for a party within the preceding two years). *See also Illinois Advisory Opinion 01-1*; *Michigan Advisory Opinion CI-1079* (1985).

Furthermore, several advisory committees have suggested that a judge should recuse from a former client's case until at least two years after the earlier representation. *See Alabama Advisory Opinion 97-658; Alabama Advisory Opinion 99-740; New York Advisory Opinion 88-17(c); U.S. Compendium of Selected Opinions §3.6-5(b)* (2001). *See also West Virginia Advisory Opinion* (May 7, 2003) (magistrate in county with a large number of judicial officers should have another magistrate conduct initial appearances for former clients who may appear when the magistrate is conducting court at night or on a weekend); *U.S. Compendium of Selected Opinions §3.6-5(c)* (2001) (judge who formerly represented various law firms in malpractice suits should recuse from all cases handled by the firms for a reasonable period (two to five years)).

In states without a specific rule, the judge's obligation to disqualify when a former client appears in a case is evaluated under the general standard of Canon 3E(1) requiring disqualification whenever "the judge's impartiality might reasonably be questioned." Factors relevant to that inquiry include:

- the length of time since the earlier representation ended (*Alabama Advisory Opinion 91-431; New York Advisory Opinion 88-17(c)*); *U.S. Compendium of Selected Opinions §3.6-5(b)* (2001));
- the nature, frequency, intensity, and duration of the representation (*Alabama Advisory Opinion 91-431; New York Advisory Opinion 88-17(c); U.S. Compendium of Selected Opinions §3.6-5(b)* (2001));
- the presence or absence of continuing personal relationships (*U.S. Compendium of Selected Opinions §3.6-5(b)* (2001));
- whether the judge had discussed the suit with the former client (*Alabama Advisory Opinion 91-431*);
- whether the judge believes she has any bias for or against the former client (*Alabama Advisory Opinion 91-431*);
- the nature of the prior and present cases (*Alabama Advisory Opinion 91-431*);
- whether the case will be tried by the judge or a jury (*Alabama Advisory Opinion 97-658*);
- whether the former client will be defending policies or practices the judge helped to formulate or defend (*Alabama Advisory Opinion 97-658*); and
- whether the former client will be calling witnesses the judge previously worked with, prepared, or called to testify (*Alabama Advisory Opinion 97-658*).

Applying these factors, the Alabama committee stated that a judge was disqualified from a claim under the Federal Employer Liability Act against a party that the judge had represented for 12 years on similar claims even though she had not represented the party for two years. *Alabama Advisory Opinion 97-658*. The committee noted the duration of the judge's representation, "the substantial likelihood that the corporation has dealt with such claims…in a consistent way over the past several years," and that the case would be tried by the judge. The advisory committee for federal judges counseled a judge to disqualify from a criminal case in which the defendant had been the judge's client nearly 20 years previously in civil matters because she would be required to sentence the defendant if convicted and she had personal knowledge regarding the defendant's background. *U.S. Compendium of Selected Opinions § 3.6-5(e)* (2001). *See also Illinois Advisory Opinion 03-2* (judge, formerly employed as an assistant public defender, is not disqualified from cases involving defendants the judge had defended unless the judge harbors a personal bias or prejudice against the defendant or possesses personal knowledge regarding disputed facts concerning the case).

In any case involving a former client, a judge should disclose the relationship on the record and consider recusal if one of the parties objects. *Alabama Advisory Opinin 97-658; Missouri Advisory Opinion 170* (1998); *New York Advisory Opinion 89-88*; *Washington Advisory Opinion 89-16. But see Washington Advisory Opinion 01-5* (if a judge has posted the name of a former client's counsel in the courtroom as having assisted in the judge's campaign and previously practiced with the judge, the judge need not disclose orally on the record that her former law firm represented the client).

Former partner or law firm

Matters handled during the association

Under Canon 3E(1)(b), a judge is disqualified from a case if "a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter…." The federal advisory committee stated that a judge should recuse under this provision "when a case is so closely related to a matter handled by the judge's former firm while the judge was there that it should be considered the same matter in controversy (i.e., common parties, overlapping factual issues, and the decision will have preclusive effect)." *U.S. Compendium of Selected Opinions § 3.3-1(j)* (2001). The disqualification applies even if:

- the judge did not work on the case (*Louisiana Advisory Opinion 67* (1986));

- the matter is routine or uncontested (*Alabama Advisory Opinion 95-546*; *Missouri Advisory Opinion 22* (1979));
- the party is now represented by a different lawyer (*Illinois Advisory Opinion 95-15; U.S. Compendium of Selected Opinions §3.6-5(d)* (2001));
- the judge's partner had been a defendant's court-appointed lawyer (*Illinois Advisory Opinion 95-15*);
- the matter was only under consideration but not yet filed at the time the judge was associated with the lawyer or firm (*Kansas Advisory Opinion JE-19* (1987));
- the judge was associated with the attorney for only a short time (*Massachusetts Advisory Opinion 95-6*); and
- the attorney was an associate in the judge's former firm and has now left the firm (*New Mexico Advisory Opinion 97-8*).

This rule requires a judge to evaluate whether a former partner "served…as a lawyer concerning the matter." The Massachusetts committee advised that a new judge's former partner had not served as a lawyer within the meaning of the canon merely by holding a perfunctory conference with a party, then referring the party elsewhere. *Massachusetts Advisory Opinion 95-5*. However, the committee advised that the former partner would be considered to have served as a lawyer in the matter if the former partner had billed for the conference, represented to opposing counsel that service of process may be made through the former partner, or had "any detailed substantive discussions of a legal problem" even if the discussions were preliminary to retention of the lawyer by the party. *See also Alabama Advisory Opinion 03-813* (judge is not disqualified from a case when his former law partner had an office conference with a party regarding the matter in controversy but had not been retained and no attorney/client relationship had been established).

Matters arising after the association

The model code does not expressly address whether disqualification is required when a judge's former firm or partner appears before the judge on a matter that was not handled by the firm or lawyer during the association. Several state codes, however, contain a per se rule that sets a specfic period during which a judge may not hear a case in those circumstances. For example, Canon 3C(1)(b) of the Delaware code adds as a ground for disqualification the fact that "the judge was associated in the practice of law within the preceding year with a law firm or lawyer acting as counsel in the proceeding."

The Michigan disqualification rules (Rule 2.003(B)(4)) provide that a judge is disqualified where the judge was "a member of a law firm representing a party within the preceding two years." The Michigan committee explained:

> The purpose of the two-year disqualification rule is to avoid requiring a party to prove actual bias in cases in which the judge has been recently personally and professionally closely associated with counsel for a party. It is unrealistic to conclude that a judge who recently, i.e. within the preceding two years, shared ethics and malpractice responsibility for the acts and omissions of the advocate, and who benefitted directly or indirectly from the client's business, could put those considerations aside to adequately and impartially hear a matter in which the advocate appears. *Michigan Advisory Opinion J-4* (1991).

Thus, the committee advised that, if within the preceding two years, a judge has been a member of a law firm appearing in a matter, the judge is automatically disqualified, regardless whether the attorney currently appearing before the judge was a member of the firm when the judge was a member or the judge was a member of the firm at the time he took judicial office.

The Illinois code of judicial conduct in Canon 3C(1)(c) provides that a judge is disqualified when "the judge was, within the preceding three years, associated in the private practice of law with any law firm or lawyer currently representing any party in the controversy…." *See Illinois Advisory Opinion 01-1*. Interpreting that provision, the Illinois judicial ethics committee stated that a judge may not preside over cases in which the state's attorney was the judge's former partner or associate within the preceding three years. *Illinois Advisory Opinion 98-7*. However, the committee stated that "a partner is a problem for three years and that ends it." *Illinois Advisory Opinion 93-10*.

Although there is no specific code or statutory requirement in New York, the advisory committee there suggested that a judge should recuse from cases involv-

ing former partners for two years. *New York Advisory Opinion 94-5*. Similarly, the New Mexico judicial ethics committee stated that, to avoid the appearance of partiality, five years should pass after all financial dealings have been resolved before a judge hears the cases of former partners or associates. *New Mexico Advisory Opinion 89-6*; *New Mexico Advisory Opinion 95-4*.

In states without a set period during which a judge must recuse from cases in which a former partner or firm appears, judicial ethics committees have advised that a new judge should recuse for a reasonable period. Explaining that a per se rule is not practical, the Arizona judicial ethics advisory committee stated:

> A policy requiring judges to disqualify themselves simply because they had prior professional relationships with attorneys would be burdensome on the judiciary, particularly in rural areas where there are few judges and where judges know many of the litigants and lawyers. *Arizona Advisory Opinion 95-11*.

Criteria suggested for evaluating whether enough time has passed to avoid an appearance of impropriety include:

- the length of the judge's association with the other attorney or firm (*Arizona Advisory Opinion 95-11*; *Georgia Advisory Opinion 223* (1997); *Massachusetts Advisory Opinion 95-6; New Mexico Advisory Opinion 89-6*);
- the closeness of the association (*Arizona Advisory Opinion 95-11*);
- the amount of time since the association ended (*Arizona Advisory Opinion 95-11*; *Georgia Advisory Opinion 223* (1997); *Massachusetts Advisory Opinion 95-6; South Carolina Advisory Opinion 5-1985*; *South Carolina Advisory Opinion 1-1983*; *Utah Informal Advisory Opinion 89-2*);
- the size of the firm (*Arizona Advisory Opinion 95-11*; *Georgia Advisory Opinion 223* (1997); *New Mexico Advisory Opinion 89-6*; *New York Advisory Opinion 89-31*);
- the size of the community (*Georgia Advisory Opinion 223* (1997); *New York Advisory Opinion 89-31*);
- any financial dealings or arrangements the judge has with former partners (*Georgia Advisory Opinion 223* (1997); *New York Advisory Opinion 89-62*; *South Carolina Advisory Opinion 1-1983*; *Utah Informal Advisory Opinion 89-2*);
- the duration and closeness of personal relationships between the judge and former partners and associates (*Louisiana Advisory Opinion 70* (1986); *New York Advisory Opinion 89-31*; *South Carolina Advisory Opinion 5-1985*; *South Carolina Advisory Opinion 1-1983*; *Utah Advisory Opinion 89-2)*;
- any continuing social relationship with the attorney (*Georgia Advisory Opinion 223* (1997); *Massachusetts Advisory Opinion 95-6*);
- whether the judge has a personal bias or prejudice toward the former partner or firm (*Alabama Advisory Opinion 95-549*); and
- the burden disqualification will place on other judges (*Georgia Advisory Opinion 223* (1997)).

See also Massachusetts Advisory Opinion 98-19 (judge is not disqualified from cases in which former partner or former partner's associate have acted as mediators except for cases that were pending in the practice during the judge's association); *South Carolina Advisory Opinion 29-2001* (judge may hear cases in which judge's former law partner is involved after he has been a judge for four years and has sold his interest in the building in which they practiced); *West Virginia Advisory Opinion* (April 30, 1997) (judge may hear cases in which one of the parties is represented by an attorney who was an associate with the judge if the cases came to the law firm after the judge's association, although the judge should disclose the relationship).

If the attorney appearing before the judge was a member or associate of the judge's firm while the judge was there but is no longer a part of the firm, the New Mexico committee advised that disqualification is not required except in cases the associate brought from that firm that were handled by the firm during the time the judge was there (*New Mexico Advisory Opinion 97-8*), while the Michigan committee advised that the judge should disclose the former relationship on the record and recuse unless the parties and counsel request that the judge proceed (*Michigan Advisory Opinion J-4* (1991)). The federal advisory committee stated that if a judge's former law firm breaks up after the judge has withdrawn and former members affiliate with

other firms, whether the judge is disqualified depends upon a "realistic assessment of the connection between the judge's old law firm and the new law firm as to the particular case or matter, the duration and closeness of personal relationships between the judge and former partners and associates etc." *U.S. Compendium of Selected Opinions § 3.3-1(f)* (2001).

Financial obligations

The majority rule is that a new judge is required to disqualify from cases involving the judge's former partner or firm for as long as the lawyer or firm is obligated to make payments to the judge regardless whether the obligation is a fixed amount or a percentage of contingency fees or accounts receivable. *See Arizona Advisory Opinion 86-1; Arkansas Advisory Opinion 96-9; Florida Advisory Opinion 00-34; Florida Advisory Opinion 03-2; Louisiana Advisory Opinion 67* (1986); *Louisiana Advisory Opinion 12* (1973); *Maryland Advisory Opinion 23* (1974); *Maryland Advisory Opinion 24* (1974); *Maryland Advisory Opinion 93* (1981); *Maryland Courts and Judicial Proceedings §1-203(c); Massachusetts Advisory Opinion 00-1; Michigan Advisory Opinion CI-293* (1977); *Michigan Advisory Opinion CI-1079* (1985); *Michigan Advisory Opinion CI-890* (1983); *Michigan Advisory Opinion CI-399* (1979); *Michigan Advisory Opinion JI-4* (1991); *Missouri Advisory Opinion 62* (1981); *Nebraska Advisory Opinion 89-1*; *New Mexico Advisory Opinion 89-6; Ohio Advisory Opinion 95-3*; *Virginia Bar Advisory Opinion LEO-368; West Virginia Advisory Opinion* (January 16, 2001); *U.S. Advisory Opinion 24* (revised 1998). *See also Michigan Advisory Opinion CI-399* (1979) (where one of the members of the firm is obligated to make payments to the judge for stock, the judge is disqualified from all cases involving the firm); *U.S. Compendium of Selected Opinions § 3.3-1(b)* (2001) (judge must recuse from all cases handled by a law firm to which the judge upon appointment referred cases until all payments due the judge have been received and for a reasonable period thereafter).

However, in a few states, a new judge is not disqualified from cases involving a former partner or firm that owes a financial obligation to the judge if the judge fully discloses the payment arrangement on the record and several conditions are met. The conditions are:

- the payment arrangement is fair (*Georgia Advisory Opinion 130* (1989));
- the term of the arrangement is as short as reasonably possible (*Georgia Advisory Opinion 130* (1989));
- the payments represent the fair market value (*Missouri Advisory Opinion 143* (1989));
- the amount of the debt is fixed (*Washington Advisory Opinion 91-5*); and
- the appearance of the attorney in the judge's court will not have a significant effect on the attorney's ability to pay the indebtedness (*Washington Advisory Opinion 91-5*).

See also South Carolina Advisory Opinion 5-1985; *South Carolina Advisory Opinion 1-1983*; *Utah Informal Advisory Opinion 89-2*. *Compare Alabama Advisory Opinion 97-659* (if a judge's portion of a contingency fee award was established but not distributed before the judge was sworn in, the judge is not disqualified from cases involving his former firm), *with Alabama Advisory Opinion 82-128* (judge is disqualified from proceedings in which his former law firm represents a party where the judge is receiving set monthly payments from the firm over a two-year period under a buy-sell agreement and his former partners are buying his interest in a tract of land under a vendor's lien deed securing a promissory note to be paid over a ten-year period).

Several committees have advised that a judge is disqualified as long as he participates in a former firm's retirement plan. *Nebraska Advisory Opinion 92-5*; *U.S. Compendium of Selected Opinions §2.7(f)* (2001). However, the California judicial ethics committee stated that a judge is not required to recuse when his former firm appears even though the judge retains an interest in the firm's pension plan where the assets of the plan fluctuate daily and the judge has neither knowledge of nor management authority over the plan's assets. *California Advisory Opinion 45* (1997). Moreover, the committee stated that the judge need not disclose his continuing interest in the plan but must disclose his prior relationship with the firm. *Accord Georgia Advisory Opinion 221* (1997). The Michigan judicial ethics committee stated that if the judge is receiving retirement payments from an independently administered pension plan, the judge is not disqualified from matters in which the judge's former firm appears. *Michigan Advi-*

sory Opinion J-20 (1990). Commentary to Canon 3E of the Alaska code of judicial conduct suggests that disqualification may be required when a judge and his family are or will be the beneficiaries of a law firm's annuities or pensions depending upon the type of arrangement and whether the law firm's success or failure in major litigation may affect the value or collectibility of benefits.

Finally, the U.S. committee advised that a judge is disqualified from cases involving his former firm if the judge's arrangement with the firm includes a financial incentive to return should the judge ever leave the bench. *U.S. Compendium of Selected Opinions §3.3-1(g)* (2001). *See also U.S. Compendium of Selected Opinions § 3.4-2(a)* (2001) (judge is disqualified if he is receiving free storage space from his former law firm).

Former government attorney

According to the commentary to Canon 3E(1)(b), a "lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning" of the canon. Therefore, if a judge was a lawyer in a government agency prior to becoming a judge, the requirement that a judge recuse from a case in which "a lawyer with whom the judge previously practiced law served during such association as a lawyer" does not apply automatically. The commentary continues, however, that a judge formerly employed by a government agency "should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned."

Former chief prosecutor

Several jurisdictions have adopted a per se rule that requires a judge who had been a chief prosecuting attorney to recuse from any criminal proceedings initiated by that office during her term even if the judge did not actively prosecute the case, has no recollection of it, and was not personally involved in the matter. *Indiana Advisory Opinion 3-89*; *Michigan Advisory Opinion JI-34* (1990); *New York Advisory Opinion 89-117*; *U.S. Compendium of Selected Opinions §3.4-4(a)* (2001). The Indiana advisory committee gave two reasons for that rule:

> First, the elected Prosecuting Attorney is considered to be "of counsel" in all cases in the office, so disqualification is necessary pursuant to [Canon 3E(1)(b)]…. Second, the ideals of judicial independence and the appearance thereof are accomplished only upon the disqualification of a former Prosecuting Attorney in a case filed during [her] term. All cases must be tried before an impartial and disinterested tribunal which should also *appear* to be fair and will preserve the public's confidence in the independence of the judiciary.

The committee for federal judges also applied that rule to judges who previously served at higher levels of the Department of Justice and as a principal assistant U.S. attorney. *U.S. Compendium of Selected Opinions §§3.4-4(a),3.4-4(a-5)* (2001).

If the case was not filed before the judge left the prosecutor's office, advisory committees disagree on the extent of involvement that triggers disqualification. The Indiana committee stated that a former chief prosecutor is disqualified as long as the proceeding was investigated or pursued during the judge's term as prosecutor even if the judge had not been personally involved. *Indiana Advisory Opinion 3-89*. The committee further advised that the judge is disqualified in all cases built upon an underlying offense that was prosecuted during her tenure.

The advisory committee for federal judges stated that a judge is disqualified from cases that were pending but did not ripen and thus were never litigated in the judge's name while she was a U.S. Attorney, but that disqualification can be waived if she was not personally involved and the matter was handled exclusively by subordinates. *U.S. Compendium of Selected Opinions § 3.4.-4(a-2)* (2001). Moreover, the federal committee advised that a judge would be disqualified from a civil case that arises out of the same fact situation and involves the same defendants as a criminal investigation in which the judge had been personally involved during her tenure as U.S. Attorney. *U.S. Compendium of Selected Opinion § 3.4.-4(a-3)* (2001). *Cf., Washington Advisory Opinion 02-8* (judge who formerly served as county prosecuting attorney may hear probation violations unless the violation arises out of a prosecution in which she was personally involved in either the charging decision or the trial or plea).

In contrast, the Michigan committee concluded that a former chief prosecutor would not be disqualified from a case that was being investigated but had not yet been filed while the judge was chief prosecutor unless the judge was personally and substantially involved in the investigation. *Michigan Advisory Opin-*

ion JI-34 (1990). The committee stated that what constitutes substantial participation depends on the context, and it need not involve a determination on the merits, direct contact with witnesses, parties, or their lawyers, or an actual appearance before a tribunal. The committee also stated that a former prosecutor was not disqualified from matters that were initiated after the judge resigned even if the charges were initiated under a policy set by the judge while chief prosecutor. Similarly, the New York committee allows a judge to preside in criminal materials that were filed following her tenure as district attorney even if the judge had appointed the assistant district attorney appearing in the case and the current district attorney had been an assistant during the judge's term. *New York Advisory Opinion 95-86*.

Former assistant prosecutor

A judge is disqualified from all cases in which he personally participated or was directly involved, including screening a case or giving advice, while a deputy or assistant prosecutor. *See, e.g., Washington Advisory Opinion 88-19*. Moreover, the judge is disqualified from any case in which he bore some responsibility as an assistant prosecutor attorney (*U.S. Compendium of Selected Opinions § 3.4-4(b)* (2001)) about which he gained knowledge of disputed evidentiary facts (*D.C. Advisory Opinion 2* (1992)*; Georgia Advisory Opinion 222* (1997)), or about which he received confidential communications from witnesses, victims, other prosecutors, or opposing parties or counsel (*Missouri Advisory Opinion 14A* (1997)).

Furthermore, disqualification is required if the prosecuting attorney appearing in a case is a former colleague with whom the judge had a relationship that may reasonably give rise to the appearance of impropriety and partiality. *D.C. Advisory Opinion 2* (1992); *D.C. Advisory Opinion 5* (1995); *Louisiana Advisory Opinion 130* (1996). The advisory committee for federal judges stated that a judge who formerly served as a state assistant attorney general should recuse in cases in which former colleagues appear for as long after the relationship has terminated as is necessary to avoid raising reasonable questions about the judge's impartiality, noting that two years would be reasonable. *U.S. Compendium of Selected Opinions §3.4-4(f)* (2001).

In cases in which the judge did not personally participate as an assistant prosecutor and in which there are no additional factors, advisory committees are divided on the question whether the judge is disqualified if the case was active while the judge was in the prosecutor's office. In several states, opinions advise that a judge is not disqualified under those circumstances although several opinions require disclosure of the relationship. *See Alabama Advisory Opinion 86-259*; *D.C. Advisory Opinion 2* (1992); *D.C. Advisory Opinion 5* (1995); *Georgia Advisory Opinion 222* (1997); *Indiana Advisory Opinion 3-89*; *Kentucky Advisory Opinion JE-32* (1981); *Louisiana Advisory Opinion 130* (1996); *Missouri Advisory Opinion 14A* (1997) (disclosure required); *Nevada Advisory Opinion 01-2; New York Advisory Opinion 87-26* (disclosure required); *Washington Advisory Opinion 88-19*; *Washington Advisory Opinion 94-1* (disclosure required). *See also Kansas Advisory Opinion JE-53* (1994) (judge who was assistant city attorney handling civil litigation may conduct arraignments or criminal trials where criminal case files were kept separate and secretarial staff was separate). The Georgia committee, however, warned that even in cases in which a judge was not involved as an assistant prosecutor, the judge should exercise "great caution" when deciding whether to disqualify "to comply with the longstanding admonition of Canon 2 to avoid the appearance of impropriety in all activities." *Georgia Advisory Opinion 222* (1997). Moreover, the D.C. advisory committee noted that, while disqualification was not required, it did not disapprove the practice of "a number of judges who were formerly prosecutors [who] found it appropriate not to preside over cases pending in the prosecutor's office while they were employed there." *D.C. Advisory Opinion 2* (1992).

Several states do require a former assistant prosecuting attorney to recuse from any case that was in the prosecutor's office during the judge's time there even if he had no personal involvement or supervisory responsibilities related to the case. For example, the Tennessee judicial ethics committee stated that, to avoid the appearance of impropriety, a judge may not preside over any case pending in the district during his tenure as assistant district attorney, even in those cases from counties for which he had no prosecutorial responsibility. *Tennessee Advisory Opinion 88-2*. The committee explained:

> An Assistant District Attorney General is "of counsel" in any criminal case pending in the district. He is a state employee, paid by the state to prosecute any and all criminal defendants as directed

> by his superior, the District Attorney General. That his personal contact with cases was limited by actual practice to one county does not alter the fact that he *technically* had access to, and responsibility for, cases in the entire district. Nor does it alter the fact that he "practiced law" with the various other assistant district attorneys general, who represented the state in the pending cases.

Accord Oregon Advisory Opinion 97-1; *West Virginia Advisory Opinion* (January 5, 1993); *West Virginia Advisory Opinion* (November 25, 1996).

Former defendant. In general, a judge who prosecuted a defendant in a criminal case while serving as a prosecutor is not disqualified from a subsequent, unrelated criminal case with the same defendant. *Michigan Advisory Opinion JI-34* (1990). *Accord Illinois Advisory Opinion 03-2* (judge, formerly employed as an assistant state's attorney, is not disqualified from hearing cases involving defendants the judge previously prosecuted unless the judge personally participated in the prosecution of the case currently before the court); *New York Advisory Opinion 91-73* (judge may preside over zoning law violation case involving a defendant the judge previously prosecuted); *Washington Advisory Opinion 95-22* (judge who was the prosecuting attorney in an earlier delinquency cases involving a defendant is not required to recuse from subsequent cases where the earlier cases were unrelated to the present charge); *U.S. Compendium of Selected Opinions § 3.4-4(b)* (2001) (judge who participated in an investigation of a defense contractor while an assistant U.S. attorney need not recuse from an unrelated case involving the contractor where the subject and issues are completely unrelated). Advisory opinions state that a judge is not disqualified even if a conviction previously obtained by the judge as a prosecutor may be used to enhance the defendant's sentence in the current, unrelated case (*Alabama Advisory Opinion 92-460*) and even if the current case is a probation revocation proceeding regarding a sentence imposed while the judge was the elected district attorney if the alleged violation occurred after he became a judge (*Georgia Advisory Opinion 218* (1998)). *But see West Virginia Advisory Opinion* (September 17, 1993) (judge must recuse from two pending civil cases in which the defendant had also been a defendant in criminal proceedings while the judge was prosecuting attorney).

However, the Alabama advisory committee cautioned:

> [T]he Judge should carefully examine the facts and circumstances known to him by virtue of the previous prosecution. If upon such examination he finds facts known to him which might or might not have been made public and which would cause his impartiality to be questioned by a reasonable man, then he should disqualify himself. *Alabama Advisory Opinion 89-364*.

Further, the judge should disqualify if, as a result of the earlier case, he has a lingering personal bias against the defendant or possesses personal knowledge of disputed facts relevant to the case. *Illinois Advisory Opinion 03-2; Michigan Advisory Opinion JI-34* (1990); *New York Advisory Opinion 91-73*.

Former public defender

The advisory committee for federal judges stated that a judge who formerly served as the Federal Public Defender should disqualify from all cases in which that office represented defendants in investigations or prosecutions during his tenure in that office. *U.S. Compendium of Selected Opinions § 3.4-4(a-4)* (2001). Moreover, the committee advised that the judge should consider whether a blanket recusal for a period of time in all Federal Public Defender cases was necessary to avoid reasonable questions about his impartiality. The committee noted that the appropriate length of time for recusal would depend upon such factors as the judge's length of service in the office and relationship with former colleagues and subordinates.

When the judge is a former assistant public defender, advisory committees are split on the question of disqualification.The Florida judical ethics committee advised that a judge who is a former assistant public defender must disqualify from all cases that were in the public defender's office while he was employed there even if the cases were assigned to another assistant public defender. *Florida Advisory Opinion 91-17*. However, the Illinois committee stated that a judge who was previously an assistant public defender is not disqualified if the defendant was represented by other members of the public defender's office. *Illinois Advisory Opinion 95-20*. *See also West Virginia Advisory Opinion* (March 16, 1999) (former public defender should disclose the prior employment in all cases involving that office to afford the parties an opportunity to file an appropriate motion). *Cf., Florida Advisory Opinion 92-36* (former chief assistant public defender

who had supervisory responsibility over an assistant public defender who had represented a juvenile when the juvenile was placed on probation may sit as a judge in a case involving allegations the juvenile violated probation where the violation took place after the judge departed the public defender's office).

Other government positions

Canon 3C(1)(e) of the Delaware code of judicial conduct and the code of conduct for U.S. judges provides that disqualification is required when "the judge has served in governmental employment and in such capacity participated as counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy." Furthermore, the Alabama committee advised that a judge who was the governor's legal advisor is disqualified from all cases in which the governor is a party that were pending during the judge's former service regardless whether she actually participated by advising or representing the governor. *Alabama Advisory Opinion 89-359. Cf., Alabama Advisory Opinion 89-365* (judge is not disqualified from cases in which the governor is a party that arose after the judge's tenure as the governor's legal advisor merely because the governor's current legal advisor worked with the judge).

The New York advisory committee stated that a judge may not preside over any tort cases against the city that were pending while she served as deputy chief of a branch office of the tort division of the corporation counsel's office, with general supervisory authority over tort cases against the municipality brought in the county where she now sits. *New York Advisory Opinion 97-8.*

Similarly, the committee advised that a judge who formerly was a high-ranking deputy county attorney should not preside over cases involving the county, or its departments or agencies, that were pending at the time the judge was employed there, noting it would be highly unlikely that she could clearly identify all matters involving various county agencies in which she had personally participated. *New York Advisory Opinion 99-11. Cf., Utah Informal Advisory Opinion 98-16* (judge who is former county attorney is not disqualified from proceedings involving the county where the issues related to the litigation arose after the judge left the office so that she does not have any personal knowledge of the issues and was not associated with anyone who had personal knowledge of the issues and it does not appear that she has maintained a close relationship with the attorneys now representing the county).

Proceedings involving children may extend over a lengthy period, raising disqualification issues for judges who represented the relevant government agencies. The Delaware and West Virginia advisory committees have announced a broad rule in such cases, requiring a judge to disqualify from any proceeding regarding a parent or child who was a party or party-in-interest in any prior proceeding in which the judge represented or advised the division of family services while serving as a deputy attorney general. *Delaware Advisory Opinion 02-2. Accord West Virginia Advisory Opinion* (August 9, 1994) (judge who used to be a child advocate must recuse from any subsequent actions brought by the child advocate office involving the same parties even if the action was not the initial action in which the judge was involved). The narrower Nebraska rule requires a judge to disqualify from any proceeding in which the operative facts directly relate to the time the judge was the supervising attorney of the child support enforcement division, even if she did not have actual knowledge of the case, but allows the judge to preside in any later proceeding involving different and separate facts. *Nebraska Advisory Opinion 01-2*. In contrast, the Wisconsin judicial ethics committee advised that a judge who formerly was the corporation counsel in charge of the county's child support agency may preside in all child support cases except those in which the judge served as a lawyer or has prior knowledge of disputed facts. *Wisconsin Advisory Opinion 00-3*. However, the Wisconsin committee did impose on the judge a duty to carefully review child support cases to determine if she should recuse when an employee she knew while acting as head of the agency will testify on a contested issue in which the employee's credibility is subject to judicial determination or when a lawyer whom the judge formerly supervised appears on a case that was in the agency at the time the judge was supervising the agency.

SUMMARY

Before taking the bench, a newly chosen judge will need to bring his or her community, political, financial, and fiduciary activities in line with the code of judicial conduct. A new judge may accept gifts and allow close friends, colleagues, or a bar association to sponsor a reception to mark the judge's investiture although there are some limitations on accepting such largess.

A newly chosen judge is required to take leave of his or her legal practice in a way that protects former clients and severs ties with former partners while complying with the rules of professional responsibility. There is no exception to the prohibition on practicing law that allows a new judge to wind-up pending cases after taking office, but a judge has an obligation to provide a former client with information about a case as long as he or she stops short of providing legal advice.

A judge may not share in the profits a law firm earns after the judge's departure, and a judge is required to divest all financial interest in a professional legal association upon taking the bench. A new judge may receive payment for his or her interest in a law practice in either a lump sum or, in most jurisdictions, in installment payments over a period of time. A judge may accept legal fees earned prior to becoming a judge or payment for work done on contingency fee lawsuits that were pending at the time the judge took office if the amount or percentage the judge will receive reasonably reflects the amount of work the judge did and is agreed to at the time the judge takes the bench. As part of the process of disassociation from a former firm, a new judge must take steps to have his or her name removed from the firm name.

A new judge will be faced with questions of disqualification based on relationships with former clients and former colleagues. A judge is disqualified from any case in which the judge served as a lawyer in the matter, including any litigation that is in any way related to the same course of events and the purpose of the prior representation. Moreover, several states require that a judge recuse from a former client's case until at least two years after the earlier representation ended even if the case is unrelated to the earlier representation. Other states suggest that a judge should consider disqualification in a case involving a former client based on factors such as the nature, frequency, intensity, and duration of the representation; the length of time since the earlier representation ended; and the presence or absence of a continuing, personal relationship.

Under Canon 3E(1)(b), a judge is disqualified from a case if "a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter . . . ," even if the judge did not work on the case and even if the party is now represented by a different lawyer. Moreover, several states have adopted a per se rule that prohibits a judge from hearing a case involving the judge's former partner or law firm for a set period even in cases that were not handled by the attorney or firm during the judge's association. Other states advise a judge to recuse for a reasonable period under those circumstances based on such criteria as the length and closeness of the judge's association with the other attorney or firm, the amount of time since the association ended, the size of the firm and community, and any continuing social or personal relationship. Under the majority rule, a new judge is disqualified from cases involving his or her former partner or firm as long as the lawyer or firm is financially obligated to make payments to the judge for his or her interest in the firm or for fees.

A judge who was a chief prosecutor prior to taking the bench is disqualified from any criminal proceeding initiated by that office during his or her term even if the judge did not actively prosecute the case, has no recollection of it, and was not personally involved in the matter. However, there is disagreement among advisory committees on whether disqualification is required if the case was investigated but not actually filed during the judge's tenure. If the judge was an assistant prosecutor, he or she is disqualified from all cases if he or she personally participated or was directly involved in the case; if he or she gave advice, bore some responsibility, gained knowledge, or received confidential communications about the case; or if the attorney appearing in the case is a former colleague with whom the judge had a close relationship. In several states, a judge is not disqualified from cases absent those factors, although disclosure is advised, but in other states, a former assistant prosecuting attorney is disqualified from any case that was in

the prosecutor's office during the judge's time there. In general, a judge who previously prosecuted a defendant is not disqualified from a subsequent, unrelated prosecution of the same defendant. Similar rules apply to former public defenders.

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