



# Ohio Board of Professional Conduct

## OPINION 2021-06

Issued August 6, 2021

Withdraws Adv. Op. 95-03 and Adv. Op. 2007-02

### **Judicial Disqualification When Receiving Fees or Other Payments From Former Law Firm**

**SYLLABUS:** A judge may accept fees or other payments from his or her former law firm for fees earned for performing legal services before the judge assumed public office. A judge must recuse himself or herself from cases in which lawyers from his or her former law firm appear as counsel and the judge is receiving or anticipates receiving fees or other payments from the firm. A judge should consider the nature of the prior professional relationship, the size of the judge's former law firm, and the time interval since the relationship concluded, when determining an appropriate period of time before hearing a case involving a former partner. A judge may not continue to participate in a law firm's partnership for purposes of receiving fees or other payments from the firm.

This nonbinding advisory opinion is issued by the Ohio Board of Professional Conduct in response to a prospective or hypothetical question regarding the application of ethics rules applicable to Ohio judges and lawyers. The Ohio Board of Professional Conduct is solely responsible for the content of this advisory opinion, and the advice contained in this opinion does not reflect and should not be construed as reflecting the opinion of the Supreme Court of Ohio. Questions regarding this advisory opinion should be directed to the staff of the Ohio Board of Professional Conduct.



# Ohio Board of Professional Conduct

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#### **QUESTIONS PRESENTED:**

- 1). Is it proper for a new judge to accept fees from his or her former law firm for legal services provided by the judge prior to taking office?
- 2). May a newly elected judge hear cases advocated by lawyers from the former firm while the judge is accepting fees or other payments, from the firm?
- 3). Is it proper for a new judge to receive retirement benefits from a former law firm pursuant to a partnership agreement through which the judge is paid a percentage of the legal fees earned by other attorneys in the firm for providing legal services to the

judge's former clients while the judge was with the law firm and during an agreed upon number of years following the judge's departure from the law firm.

4). Is there a specific period of time after a judge leaves a law firm partnership in which a judge would be prohibited from hearing cases advocated by a former law partner?

5). May law firm partners and a newly elected judge continue their law partnership for the sole purpose of receiving fees or other payments from the firm?

**APPLICABLE RULES:** Jud.Cond.R. 1.2, 2.11, 3.10, 3.11, 3.15 , Prof.Cond.R. 7.5

**OPINION:**

*Question 1*

When a new judge assumes office, the winding up of his or her former law practice may involve a degree of financial entanglement with the judge's former law firm that implicates the judge's obligations under the Code of Judicial Conduct. As often the case, the judge may have earned legal fees prior taking office, but the fees have not been collected or received by the former law firm. The Code of Judicial Conduct prohibits a judge from practicing law [See Jud.Cond.R. 3.10] but does not prevent a judge from accepting outstanding fees from his or her former law firm after taking office. A judge transitioning from private practice is entitled to accept payments reflecting a flat fee or the number of hours billed at an agreed upon hourly rate for legal services performed. Contingent fees may also be paid to a judge once the contingency occurs, based upon *quantum meruit* for services performed prior to leaving the former law firm. See *Reid, Johnson, Downes, Andrachik & Webster v. Lansberry* (1994), 68 Ohio St.3d 570 (*quantum meruit* proper basis for determining fee for services rendered by former law firm counsel). Any income received by a judge from a former law firm must be reported by the judge on his or her annual financial disclosure statement. Jud.Cond.R. 3.15, R.C. §102.02.

*Questions 2 and 3*

Jud.Cond.R. 2.11(A) requires a judge to recuse himself or herself from cases when "the judge's impartiality might be reasonably questioned." When a judge anticipates the receipt of fees or other payments from his or her former firm, the application of

Jud.Cond.R. 2.11(A) restricts the judge's ability to hear cases when the lawyers of the former firm are counsel for a party. The continued receipt by a judge of fees from a former firm would cause a reasonable and objective observer to question the judge's impartiality in a case. *See In re Disqualification of Lewis*, 117 Ohio St.3d 1227, 2004-Ohio-7359 (a judge's participation in a case presents an appearance of impropriety if "a reasonable and objective observer would harbor serious doubts about the judge's impartiality."). The judge's recusal in such a scenario avoids the appearance of impropriety that would occur if a law firm with existing financial ties to a judge appears before the judge.

Disqualification is additionally required when the judge "has a personal bias or prejudice concerning a party or a party's lawyer." Jud.Cond.R. 2.11(A)(1). Waiver of disqualification, in most circumstances, will not be appropriate while a judge is receiving fees or other payments from a former law firm due to the potential for personal bias toward the lawyers in a firm with which the judge still maintains financial ties. Waiver of disqualification is never permitted when personal bias or prejudice of the judge exists. Jud.Cond.R. 2.11(C). Consequently, a judge should carefully consider whether he or she harbors any bias toward the lawyers of the former law firm because of the anticipated or continued receipt of fees or other payments before employing the waiver of disqualification process in Jud.Cond.R. 2.11(C).

A type of payment a judge receives after assuming the bench may be characterized by the law firm as retirement benefits. In the question presented, the judge would receive a percentage of fees earned on legal services provided by other lawyers to the judge's former clients during an agreed upon period of time after retirement. Neither the Code of Judicial Conduct nor the Rules of Professional Conduct specifically prohibits an agreement under these terms. However, due to the requirement that a judge recuse from cases under such circumstances, any retirement agreement should not provide for the payment of retirement income in perpetuity. As soon as practicable, a judge should divest himself or herself from financial interests that would require frequent disqualification. Jud.Cond.R. 3.11.

*Question 4*

Judicial recusal from a case in which a former law partner appears as counsel is not expressly mandated by the Code of Judicial Conduct. *See also* ABA Inf. Op. 87-2524 ("a judge is not disqualified from trials in which the judge's former associate participates

as counsel solely as a result of their prior association.”). Nor does the Code establish a specific period of time for a judge to recuse from cases advocated by a judge’s former law partner. However, the Chief Justice has reviewed the same question in a line of disqualification cases examining prior professional relationships between judges and lawyers and has held that the prior relationship is not grounds for disqualification when it ended some years ago. *In re Disqualification of Ward*, 100 Ohio St.3d 1211, 2002-Ohio-7467 (no disqualification when professional relationship ended seven years before the affidavit was filed). *See also In re Disqualification of Cross* (1991), 74 Ohio St.3d 1228, 657 N.E.2d 1338 (relationship as law partners ended six years before the affidavit was filed); *In re Disqualification of Vercillo*, 137 Ohio St.3d 1237, 2013-Ohio-5763 (prior professional relationship ended 20 years before hearing matter involving former partner).

A new judge should carefully consider the appropriate amount of time before hearing a case involving a former partner as counsel. A decision should be made by a judge in light of the existence of any personal bias or prejudice, whether his or her impartiality could be questioned by a reasonable and objective observer, and the judge’s obligation to maintain public confidence in the judiciary. Jud.Cond.R. 1.2. In general, questions concerning impartiality may depend on the size of the judge’s former firm and the nature of the former partnership. Recusal may be more necessary and extend for a longer period of time where the law firm is small and the partnership was close, as compared to a situation in which the judge practiced in a large firm with multiple offices and practice groups and had limited contact with many of the firm’s partners. Another factor is the time that has elapsed since the termination of the professional relationship between the judge and a former partner. For example, a period of six months to one year may be a sufficient and appropriate period of time before a judge hears cases involving a former partner as counsel. However, a judge may opt to refrain from hearing cases involving his former firm or partners for a longer period of time to place some temporal distance from the prior relationship and avoid any reasonable appearance of impropriety.

#### *Question 5*

As previously noted, a newly elected or appointed judge is required to cease the practice of law upon taking office. Jud.Cond.R. 3.10. Consequently, a judge may not continue to participate in a law firm’s partnership for purpose of receiving fees or other payments from the firm. The Board has previously opined that a judge who maintains

any interest in their former law practice, no matter how it is structured, creates the appearance of impropriety. Adv. Op. 89-17. Additionally, a law firm partnership may not include the name of a public official in the firm's name after the former partner assumes public office. Prof.Cond.R. 7.5(c).