



Committee on Professional Ethics

Opinion #541 - 3/29/82 (8-82) Topic: Judges; appearance of integrity and impartiality of judiciary.

Digest: Judge may not hear cases involving law firms with which he is discussing employment.

Code: EC 9-4.

Rules Governing
Judicial Conduct: Rule 100.3(c)(1),
100.5(c)(1).

QUESTION

May a judge participate in cases involving law firms with which he is negotiating, directly or indirectly, for employment?

OPINION

The Rules Governing Judicial Conduct (22 NYCRR Part 100) require a judge to perform the duties of the office impartially and to avoid any appearance of impropriety, in order to maintain public confidence in the integrity and impartiality of the judiciary. Under Rule 100.3(c)(1) (preamble), a judge must disqualify himself in any proceeding if his impartiality might reasonably be questioned. Further, Rule 100.5(c)(1) provides that a judge "shall refrain from financial and business dealings that tend to reflect adversely on his impartiality" See also 28 U.S.C. § 455(a) (Supp. 1980).

Although these rules give specific instances in which the impartiality of a judge reasonably might be questioned, they do not address the situation of a judge who is contemplating leaving the bench and who is, directly or indirectly, in contact with a law firm concerning private employment. Nevertheless, it seems clear that impartiality and the appearance of impartiality could be jeopardized if lawyers whose firms were discussing a possible affiliation with the judge appeared as advocates before him. In such a case, there is a significant likelihood that the public would perceive the judge to be biased.

As noted in EC 9-4, "the very essence of the legal system is to provide procedures by which matters can be presented in an impartial manner so that they may be decided solely upon the merits" A judge should not negotiate for private employment, either himself

or through others, with any lawyer or law firm appearing before him because of the real possibility that the judge's actions in the proceeding might appear to be influenced by the hope of employment.

Although we have found no direct precedents addressing the situation of a judge leaving the bench and seeking private employment, several ethics opinions are relevant by analogy. In N.Y. State 289 (1973), the Committee held that campaign contributions could not be solicited or accepted by a judicial candidate from a lawyer with a case pending before the candidate. Similarly, it would not be at all conducive to public confidence in the impartiality of the judicial system to have a judge rule on matters where a law firm with which he is negotiating regarding future employment is counsel. A judge also should weigh carefully entering into discussions with a lawyer or law firm that has come before him so recently that the acceptance of employment might give the appearance of use of the judicial office for personal gain. "A judge should studiously avoid wherever possible every situation that might reasonably give rise to the impression on the part of litigants or of the public that his decisions were influenced by favoritism." ABA 200 (1940). See also N.Y. State 511 (1979).

A useful analogy may also be drawn from 18 U.S.C. § 208(a) (Supp. 1979), which prohibits an employee of the executive branch of the government from participating personally and substantially in any matter in which "any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest." Although this statute does not cover judicial personnel, it otherwise clearly would apply to the situation of a judge presiding over a matter involving a lawyer or law firm with which the judge is discussing employment.

If a judge decides not to join a particular firm, the fact that the judge at some time in the past consulted with that firm with a view toward private employment should for a reasonable period of time be disclosed to all parties on the occasion of subsequent appearances before the judge by the firm, and perhaps may require his recusal.

In situations in which the impartiality or objectivity of a judge might reasonably be questioned, it is for the judge to disqualify himself from sitting on the matter. See N.Y. State 511 (1979). "The responsibility is on the judge not to sit in a case unless he is both free from bias and from the appearance thereof." ABA 200 (1940).

For the foregoing reasons, the question posed is answered in the negative.
