ADVISORY COMMITTEE ON JUDICIAL CONDUCT
OF THE
DISTRICT OP COLUMBIA COURTS

ADVISORY OPINION NO. 5
[January 27, 1995]

WHETHER DISQUALIFICATION OF JUDGE FROM CRIMINAL MATTERS PROSECUTED BY THE UNITED STATES ATTORNEY'S OFFICE IS NECESSARY BECAUSE OF JUDGE'S PAST EMPLOYMENT WITH THE DEPARTMENT OF JUSTICE

A senior judge of the Superior Court who has resumed sitting has requested a formal advisory opinion about whether he must recuse himself from handling criminal matters prosecuted by the United States Attorney's Office for the District of Columbia if the offense forming the basis of prosecution is alleged to have occurred on a date when he was an inactive senior judge employed by the Department of Justice.

The judge who is inquiring has been a Special Assistant to the Attorney General, an Associate Deputy Attorney General and a Deputy Associate Deputy Associate Attorney General. In those positions, he has been responsible for Department-wide oversight of the debt collection activities of the Department of Justice, particularly the collection of civil and criminal fines imposed by federal judges. He has worked with all ninety-three United States Attorney's Offices (USAOs) on debt

collection matters. His role, however, has been to act as a liaison between the USAOs and the Department and to train USAO personnel with respect to debt collection litigation and policies. He has not worked on individual cases or directly supervised litigation. He has had little involvement of any kind with the USAO for the District of Columbia. Because fines imposed and collected in the D.C. Superior Court go to local rather than federal programs, he has had no connection with debt collection issues arising from matters in Superior Court.

The Committee concludes that the issue presented is largely controlled by its Advisory Opinion No. 2, 120 Daily Wash. L. Rptr. 1745 (August 17, 1992). In that opinion we addressed the question of whether a judge who formerly had been an Assistant United States Attorney in this jurisdiction needed to disqualify herself from matters pending in that Office while she was employed there. We concluded that disqualification was only necessary if during her employment she had acquired personal knowledge of or served as a lawyer in the matter in controversy, or if her impartiality might reasonably be questioned because of her former association with a lawyer who served as a lawyer in the matter in controversy. 120 Daily Wash. L. Rptr. at 1751. That conclusion appears equally applicable

here, particularly since the employment recited by the inquiring judge in this instance is more removed from matters pending in Superior Court than employment as an Assistant United States Attorney.

Advisory Opinion No. 2 was issued before the District of Columbia Courts adopted, with revisions, the 1990 ABA Model Code of Judicial Conduct (1990 Code).[1] Thus, the 1972 ABA Model Code of Judicial Conduct, as amended in 1982 and 1984 (1972 Code), was in effect. For that reason, Advisory Opinion No. 2 discussed the applicability of both the 1972 Code and the 1990 Code, which was actively under consideration for adoption at that time. Because the 1990 Code, while adopted, is not yet in effect, we follow the same procedure here.

Canon 2 of the 1990 Code, like Canon 2 of the 1972 Code, provides that "[a] judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities." As stated in Advisory Opinion No. 2, "[T]he standard of conduct is an objective one: Would a reasonable person knowing all the circumstances question the judge's impartiality?" 120 Daily Wash. L. Rptr. at 1749.

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[1] The 1990 Code has now been adopted by the Joint Committee on Judicial Administration of the District of Columbia Courts, effective June 1, 1995.

In answering the question of whether the inquiring judge's impartiality might be questioned, the Committee looks to Canon 3E(1)(a) of the 1990 Code, which is substantively unchanged from Canon 3C(1)(a) of the 1972 Code. It provides:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> > (a) the judge has personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

With respect to "personal bias or prejudice concerning a party or a party's lawyer," our Court of Appeals has ruled that "[m]ere allegations based on a judge's background are insufficient to suggest partiality toward the parties before him." *See* Gregory v. United States, 393 A.2d 132, 143 (D.C. 1978). Thus, as we concluded in Advisory Opinion No. 2, there is no presumption of bias or prejudice simply by virtue of the judge's past employment. 120 Daily Wash. L. Rptr. at 1751.

As Canon 3C(1) (a) demonstrates, there is no question that if the inquiring judge, by virtue of his past employment at the Department of Justice, has "personal knowledge of disputed evidentiary facts," then he must disqualify himself. The inquiring judge must take care to

insure that this is not the case. On the facts as presented, however, it would appear unlikely that he will have personal knowledge of disputed evidentiary facts.

Canon 3E(1) (b) of the 1990 Code, which is substantively unchanged from Canon 3C(1) (b) of the 1972 Code, provides in relevant part that a judge should also disqualify himself or herself where:

> (b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter...

The facts given the Committee indicate that the inquiring judge would not likely have served as a lawyer in any matter coming before him in Superior Court. On the other hand, if all lawyers employed by the Department of Justice, including those in the United States Attorney's Office, are deemed to “practice law” together, the language of Canon 3E(1)(b) would suggest that disqualification would be required.

The commentary to Canon 3E(1)(b), however, limits this language with respect to judges formerly employed in government. It states:

> A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Section 3E(1) (b); a judge formerly employed by a government agency, however, should

> disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.

Thus, the mere fact that lawyers from the United States Attorney's Office were employed by the same government agency as the judge, that is, the Department of Justice, would not alone be sufficient to require the inquiring judge to disqualify himself. *See* Advisory Opinion No. 2, 120 Daily Wash. L. Rptr. at 1751. *Cf.* United States v. Zarqari, 419 F. Supp. 494, 505 (N.D. Cal. 1976).

The facts forming the basis of this inquiry are distinguishable from those analyzed in Scott v. United States, 559 A.2d 745 (D.C. 1989). In Scott, the Court of Appeals concluded that, without the consent of a defendant, a trial judge cannot handle a criminal matter prosecuted by the United States Attorney's Office while actively negotiating for employment with the Justice Department's Executive Office for United States Attorneys. [The employment sought by the trial judge involved "oversight responsibility and policy guidance to the Debt Collection Units in the United States Attorney's Offices." 559 A.2d at 750.] The Court of Appeals concluded that "from the perspective of 'the average person,' a fully informed person might reasonably question whether the judge 'could

decide the case with the requisite aloofness and disinterest when he [was seeking] employment [in the prosecutor's executive office in the department prosecuting] the case.'" 559 A.2d at 750.

There is a significant difference, however, between a judge who is seeking an employment position, where the employer is in a position to either confer or withhold a benefit, and a judge who has left an employment position. Once the judge is no longer in the role of applicant, the rule providing that partiality cannot be presumed based on a judge's background becomes controlling.

In sum, the Committee concludes that the inquiring judge need not disqualify himself from criminal matters where the offense charged was committed while he was employed by the Department of Justice unless he has personal knowledge of material facts, he has served as a lawyer in the matter in controversy, or his impartiality might reasonably be questioned because of some particularized former association with a lawyer who served as a lawyer concerning the matter.