



FORMAL ADVISORY OPINION NO #01-15

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**DISQUALIFICATION ISSUES WHEN A PART-TIME JUDGE
APPEARS IN A CASE AS A LAWYER**

INTRODUCTION

Part-time judges are allowed to practice law. A number of disclosure and/or disqualification or recusal issues arise for the presiding judge when a Part-time judge appears in a case as a lawyer before the presiding judge.

REQUEST FOR ADVICE

The Commission on Judicial Conduct has been requested to provide disclosure and/or disqualification or recusal guidelines for a presiding judge when a Part-time judge, who serves in the same circuit as the presiding judge, appears in a case as a lawyer before the presiding judge.

DEFINITIONS

For purposes of this advisory opinion, the following definitions apply:

“Code” means the Hawai’i Revised Code of Judicial Conduct.

“Rule” means a numbered rule under each canon of the Code.

“Presiding Judge” refers to the judge (full-time or part-time) in the District Court or District Family Court to whom a case is assigned.

“Part-time Judge” refers to a part-time (also referred to as “per diem”) judge who is engaged in the practice of law.

“Part-time Judge/Lawyer” refers to a Part-time Judge who serves in the same circuit and appears as a lawyer in a case assigned to the Presiding Judge.

“Judicial colleagues” refers to judges (full-time and part-time) who serve as judges in the same court of the same circuit, or have some other significant judicial working relationship between them.

FORMAL ADVISORY OPINION #01-15

June 26, 2015

Page 2

APPLICABLE CODE AND RULES

Rule 3.10 provides, in relevant part, that “A judge shall not practice law.” However, Part III (a)(2) of the Code, in qualifying the applicability of Rule 3.10 of the Code, which prohibits a judge from practicing law, allows part-time judges to engage in the practice of law. See also HRS §604-2.

Part III(b) of the Code provides that “a part-time judge shall not practice law in the court on which the judge serves.”

Part III (c) of the Code provides that the “District Family Courts and the District Courts are separate courts. A part-time judge assigned to preside solely in District Court is not disqualified from practicing before the District Family Court, and a part-time judge assigned to preside solely in the District Family Court is not disqualified from practicing before the District Court.”

Rule 2.11(a) of the Code provides that “Subject to the rule of necessity, a judge shall disqualify or recuse himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned. . . .”

The purposes of the foregoing rules are to:

- promote the “public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety. See Rule 1.2.
- deter “misusing the prestige of judicial office to advance the personal or economic interests” of the Part-time Judge /Lawyer and others, including clients of the Part-time Judge/Lawyer. See Rule 1.3.

ADVISORY

A Presiding Judge must consider disclosure and/or disqualification or recusal whenever a Part-time Judge/Lawyer appears in a case before the Presiding Judge under the following circumstances.

1. Presiding Judge and Part-time Judge/Lawyer Serve as Judges in the Same Court. Generally, when the Presiding Judge and the Part-time Judge both serve as judges in the same court of the same circuit, they are considered to be judicial colleagues. The Presiding Judge is disqualified from handling cases in which the Part-time Judge/Lawyer represents a party in a case before the Presiding Judge because, as judicial colleagues, they may be perceived as affording personal advantage or deferential treatment to each other or otherwise discussing *ex parte* matters involving the case.

If a Presiding Judge sits in both the District Court and District Family Court, then a Part-time Judge, whether sitting in the District Court or District Family Court, and the Presiding Judge are judicial colleagues. When a Part-time Judge/Lawyer appears before the Presiding Judge, who

FORMAL ADVISORY OPINION #01-15

June 26, 2015

Page 3

in both the District Court and District Family Court, the Presiding Judge should disqualify from presiding over the case.

2. Presiding Judge Has Supervisory Responsibilities Over a Part-time Judge. If a Presiding Judge has supervisory responsibilities over a Part-time Judge, including the assignment of cases or responsibilities, training, or supervision of a Part-time Judge, the Presiding Judge and the Part-time Judge are judicial colleagues. In such circumstance, the Presiding Judge should disqualify when a Part-time Judge/Lawyer, over whom the Presiding Judge has such responsibilities, appears in a case before the Presiding Judge.

For purposes of determining whether a Part-time Judge is a judicial colleague of another judge, a title given to a judge is not necessarily determinative of whether the judge is serving in that position. The actual performance of responsibilities, duties or services should be considered and not merely the title assigned to the judge.

For example, a circuit court judge may be designated as the chief judge of the circuit ("circuit court/chief judge") which includes the Circuit Court and the District Court and District Family Court. The circuit court/chief judge hears felony domestic abuse cases but does not handle any other family court matters which are handled by the District Family Court. If there is no interaction between the circuit court/chief judge and the Part-time Judge who is assigned only to the District Family Court, the circuit court/chief judge would probably not be considered to be a judicial colleague of that District Family Court only Part-time Judge.

3. Limited Administrative Types of Tasks May Not be Considered Sufficient to Disqualify. A Presiding Judge's performance in one court of some limited and only occasional ministerial or purely administrative services which do not involve adversarial or materially substantive matters, may be *de minimus* or insignificant, and not enough to consider the Presiding Judge to be a judicial colleague of a Part-time Judge/Lawyer practicing before the Presiding Judge in that same court which warrants disqualification or recusal.

For example, a Presiding Judge assigned only to the District Family Court may, on occasion or due to necessity, be assigned on a limited basis, to perform certain duties in matters within the jurisdiction of the District Court such as:

- weekend/after hours reviews of JDPC's (judicial determination of probable cause) and search warrants;
- custody arraignment and pleas or the like;
- stipulations or uncontested per forma motions;
- setting trial or motion hearing date;
- continuing a matter; or
- acting on written submissions of civil traffic infraction motions and answers.

FORMAL ADVISORY OPINION #01-15

June 26, 2015

Page 4

Such limited assignments or performance of tasks are not necessarily tantamount to serving in the District Court, when such limited assignments or performance represent the only activity performed by the full-time or Part-time Judge in that court. *De minimus* or insignificant activities alone are generally not necessarily sufficient to require, in this example, the Presiding Judge to disqualify from handling a case when a District Court Part-time Judge/Lawyer appears before the Presiding Judge in the District Family Court.

4. “Wait Period” After the Elimination of a Disqualifying Factor. If an activity is not clearly *de minimus* or insignificant, reassignment from that activity eliminates the circumstance that may otherwise result in a Presiding Judge and a Part-time Judge to be considered judicial colleagues, and there is no wait period before the Presiding Judge may handle a case in which the Part-time Judge/Lawyer appears. For example, if a full-time District Court judge is handling hearings but not fully contested trials only once or twice a month in District Family Court, then as soon as that duty is eliminated, the basis requiring disqualification from handling judicial colleague cases is eliminated immediately, and a wait period might not be necessary. As the eliminated activity increases in significance, however, a wait period may need to be considered.
5. Part-time Judge/Lawyer Appears Before a Presiding Judge, Who is a Part-time Judge. Subject to applicable Rules, a Presiding Judge, who is a Part-time Judge, is not automatically disqualified when a Part-time Judge/Lawyer, who presides in a different court in the same circuit, appears before the Presiding Judge. For example, subject to applicable Rules, a Presiding Judge, who is a District Court Part-time Judge, is not disqualified from presiding over a case in which a District Family Court Part-time Judge/Lawyer appears in a case. The same would apply if the roles were reversed.

Where both the Presiding Judge, who is a Part-time Judge, and the Part-time Judge/Lawyer appearing before the Presiding Judge are allowed to practice law, the Presiding Judge must consider whether there is an appearance of impropriety, the Presiding Judge's impartiality might reasonably be questioned or the Presiding Judge has a personal bias or prejudice for or against the Part-time Judge/Lawyer who is appearing in a case before the Presiding Judge. For example, if the Presiding Judge and the Part-time Judge/Lawyer have a case in which both are involved as lawyers, the Presiding Judge should disqualify from hearing the case in which the Part-time Judge/Lawyer is appearing.

The rule of necessity has relevance when crisscrossing occurs and special consideration needs to be given on a case-by-case basis to all factors including whether there is an appearance of impropriety, the Presiding Judge's impartiality might reasonably be questioned or the Presiding Judge has a personal bias or prejudice for or against the Part-time Judge/Lawyer who is appearing in a case before the Presiding Judge. In any event, the fact that the Presiding Judge and Part-time Judge/Lawyer appearing before the Presiding Judge are both Part-time Judges, but serving in different courts in that circuit, should be disclosed on the record.

6. Lawyer in the Part-time Judge's Law Firm Appears before the Presiding Judge. Partners and associates of a Part-time Judge/Lawyer are not allowed to practice law in the court in which the Part-time Judge sits.

FORMAL ADVISORY OPINION #01-15

June 26, 2015

Page 5

A Presiding Judge is not necessarily disqualified from handling a case which involves a lawyer from the law firm of a Part-time Judge/Lawyer who is considered a judicial colleague of the Presiding Judge.

For example, if a lawyer in a case in District Court is the partner or associate of a District Family Court Part-time Judge, who, in turn, is a judicial colleague of the Presiding Judge, the Presiding Judge should disclose on the record in the case the relationship involving the lawyer and the (District Family Court) Part-time Judge/Lawyer's law firm. Also, on a case-by-case basis, the Presiding Judge should examine and consider all factors regarding the relationship between the Presiding Judge and the Part-time Judge as judicial colleagues and the Part-time Judge's law firm, to consider whether disqualification or recusal is appropriate.

CONCLUSION

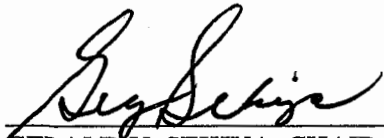
In summary, the Rules provide that a Part-time Judge is permitted to practice law but not in the court in which the Part-time Judge sits. The Rules make a distinction between the District Court and the District Family Court as being separate courts. The Commission has advised that the partners or associates of a Part-time Judge are not allowed to practice law in the court in which the Part-time Judge sits.

This advisory is not an exhaustive analysis of all circumstances when the Presiding Judge must consider disclosure and/or disqualification or recusal whenever a Part-time Judge/Lawyer appears in a case before the Presiding Judge.

Even though a Part-time Judge is allowed to practice law, except in the court in which the Part-time Judge sits, whenever the Presiding Judge knows that a Part-time Judge/Lawyer is appearing in a case, the Presiding Judge must consider whether there are circumstances which require the Presiding Judge to disclose and/or disqualify or recuse in the interest of protecting the public confidence in the independence, integrity, and impartiality of the judiciary and avoiding the appearance of impropriety. Further, for the same reason, a Presiding Judge must also consider disclosure and/or disqualification or recusal on a case-by-case basis when the Presiding Judge knows that a partner or associate of a Part-time Judge is appearing in a case before the Presiding Judge.

Similarly, whenever a Part-time Judge/Lawyer is appearing before a Presiding Judge, the Part-time Judge/Lawyer should be mindful of circumstances which might require the Presiding Judge to disclose and/or disqualify or recuse and bring the matter to the attention of the Presiding Judge if the Presiding Judge does not do so.

FOR THE COMMISSION ON
JUDICIAL CONDUCT


GERALD Y. SEKIYA, CHAIR