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FORMAL ADVISORY OPINION #01-14
FEBRUARY 28, 2014

QUESTION PRESENTED

Per diem judges are allowed to engage in the practice of law. What are some guidelines for per diem judges and their supervisors to follow when faced with apparent conflicts that are likely to arise due to their law practice?

RESPONSE

As set forth below, per diem judges need to consider disclosure and/or recusal or disqualification whenever a case before them involves a matter related to their law practice (current or recently concluded), a party or witness (client or opposing party), a lawyer (co-counsel or opposing) or an identical/similar material factual or legal issue.

APPLICABLE RULES

The following provisions of the Hawaii Revised Code of Judicial Conduct ("RCJC") are helpful:

- (a) Practicing Law But Not in the Court the Judge Serves

III. PART-TIME JUDGE

- (b) A part-time judge shall not practice law in the court on which the judge serves and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.

* * *

- (c) Courts Distinguished. For purposes of Part III(b) of this section, 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.

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(b) Judge's Impartiality Might Be Reasonably Questioned.

Rule 2.11. DISQUALIFICATION OR RECUSAL

(a) 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, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice for or against a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

(2) The judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is:

(A) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;

(B) acting as a lawyer in the proceeding;

(C) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or

(D) likely to be a witness in the proceeding.

(3) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding.

(c) Public Confidence in the Judiciary

Rule 1.2. PROMOTING CONFIDENCE IN THE JUDICIARY

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety.

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GUIDELINES

Where a per diem judge is allowed to practice law, a per diem judge/lawyer will frequently face conflicts which may arise between the part-time performance of judicial responsibilities and the clients/categories of clients and matters that the per diem judge handles as a lawyer, which may require disclosure and/or disqualification or recusal (hereinafter referred to as "recusal").

The following guidelines address some of the circumstances which per diem judges should be mindful of. See Gray and Biro, An Ethics Guide for Part-Time Lawyer Judges, American Judicature Society (1999).

1. Recusal depends on the particular circumstances of each situation and per diem judges must consider recusal on a case by case basis, applying the guidelines set forth below.

2. If the case or matter before the per diem judge involves a party, a lawyer, or a material factual or legal issue that is directly related to a matter that the judge is handling as a lawyer, the judge needs to consider the following factors in determining whether the judge should recuse from the case.

(a) Whenever opposing counsel is appearing before the per diem judge/lawyer, RCJC Rule 2.11(a)(1) provides that a judge shall disqualify if the judge has a personal bias or prejudice for or against ...a party's lawyer." In The Matter of the Application of David S. Ferguson, 74 Haw. 394 at 407(1993), the Hawaii Supreme Court addressed "a hypothetical situation in which an attorney could be arguing bitterly against another attorney one day, only to face his opponent as a judge the next" and commented:

"(T)he codes of professional responsibility and judicial conduct direct judges to avoid even the appearance of impropriety. A per diem judge is precluded, therefore, from sitting on a case in a different court in which his or her impartiality might reasonably be questioned."

In Arkansas Advisory Opinion 98-2, involving a per diem judge, who had represented criminal defendants in cases in which the opposing counsel was the county prosecuting attorney, while also presiding as a municipal judge over criminal cases in which the state was represented by the same county prosecuting attorney, it was stated:

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“[A] municipal judge who is engaged in an adversarial role opposing a prosecuting attorney in a criminal case brought by the State and who presides over proceedings involving that same prosecuting attorney is in an untenable position, however principled that individual.”

Cindy Gray, in An Ethics Guide for Part-Time Lawyer Judges, American Judicature Society, 1999, pages 54, 55, explains:

“If a part-time lawyer judge practices in the court on which he or she serves, the part-time lawyer’s status as a judge may have a ‘chilling effect,’ causing attorneys who regularly appear before the judge to treat the per diem judge differently when they are adversaries...Conversely, the part-time judge may feel pressure to make rulings favorable to attorneys who are his or her opposing counsel in cases in the hope of receiving less aggressive treatment or certain advantages in negotiations when they are adversaries.”
(citations omitted)

Accordingly, if the per diem judge has a private law practice with a significant amount of criminal defense work, the judge should not be handling criminal cases in the district court in which the judge serves because recusal is probably necessary in all criminal cases involving the office of the prosecuting attorney.

(b) If the facts and circumstances of a matter that is before the per diem judge are similar to the facts and circumstances of a matter which the per diem judge/lawyer is handling in the private practice of law such that the per diem judge cannot or appears not to be impartial, the judge needs to consider recusal.

A per diem judge who acts as a judge one day and as an advocate the next is confronted with inherent difficulties that ought to be avoided and deprecates the employment of such a system. To permit a per diem judge with criminal jurisdiction to practice criminal law would weaken the confidence of the public in the impartiality and objectivity of the judiciary. State v. White, 114 S.W.3d 469 (Tenn. 2003)

Thus, if the per diem judge is handling a case that involves a material, factual or legal issue that the judge is advocating in the judge’s private practice as a lawyer, the judge should disclose that information and/or consider recusal.

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(c) If any of the parties or lawyers (including lawyers in the firm of that lawyer) appearing in a case before the per diem judge is involved in a matter the judge is handling as a private lawyer, the judge should disclose that information and/or consider recusal.

3. When the per diem judge serves in District Court on matters involved in cases that may go to Circuit Court, the judge is not prevented from practicing as a lawyer in Circuit Court, unless the volume of such work is so great as to cause a perception that the per diem judge is *de facto* serving as a judge in Circuit Court.

A per diem judge/lawyer shall not practice law in the court on which the judge serves and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.

This Commission previously advised that partners, associates, and “of counsel” lawyers of the per diem judge/lawyer’s law firm cannot practice law in the court in which the per diem judge/lawyer sits.

Per diem judges assigned to district court often handle matters that are incidental and related to criminal cases that are in or will go to Circuit Court. Such assigned tasks include processing search warrant applications, arrest warrant applications, information charging packets, forty-eight hour Judicial Determination of Probable Cause matters, and the like. Today, these tasks are considered collateral to responsibilities of per diem judges serving in District Court or District Family Court.

If the per diem judge has performed such tasks related to cases that end up in Circuit Court, these cases in Circuit Court will have in their files, orders and like matters that were processed by the per diem judge while serving in district court. This does not mean that the per diem judge is serving in Circuit Court for purposes of the prohibition against the per diem judge/lawyer practicing law in the court in which the per diem judge serves. To the contrary, although it could appear that the per diem judge is handling circuit court cases, the task was in fact performed by the per diem judge while serving in district court. When the per diem judge did so, the per diem judge presumably applied the guidelines in determining whether to recuse from such involvement; and if such guidelines are met, the mere fact that those cases go to Circuit Court does not prevent the per diem judge/lawyer from practicing as a lawyer in Circuit Court. On the other hand, if a major portion of the per diem judge’s work involves processing matters involved in cases that go to Circuit Court, as opposed to being occasional and collateral to the per diem judge’s responsibilities in District Court, the appearance that the per diem judge is serving in Circuit Court might be too great to ignore and the per diem judge/lawyer needs to consider the possibility that practicing law in Circuit Court may be prohibited.

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4. Necessity is a factor that should also be considered.

Notwithstanding the foregoing, a per diem judge may handle matters in which the per diem judge may be conflicted on occasion if it is necessary to do so on a case-by-case basis. Comment [3] to RCJC Rule 2.11 provides as follows:

“[3] As provided for in Rule 2.11(A), the rule of necessity may override the rule of disqualification or recusal. For example, a judge ...might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In matters that require immediate action, the judge must disclose on the record the basis for possible disqualification or recusal and make reasonable efforts to transfer the matter to another judge as soon as practicable.”

RECOMMENDATION

A per diem judge/lawyer must maintain a strict separation between the practice of law and the performance of judicial responsibilities. The burden is on the per diem judge to avoid circumstances which are likely to cause frequent recusal. Per diem judges must be vigilant of categories of clients and matters which a per diem judge is handling, as a lawyer, which may require recusal.

If it appears that the categories of clients and matters which the per diem judge is handling as a lawyer will lead to frequent recusal, the supervising judge should consider assigning the per diem judge to handle other judicial responsibilities which lessen the incidents of recusal. A per diem judge/lawyer, might also consider not accepting cases and matters in his/her law practice to avoid recusal issues which may prevent assignment to various calendars.

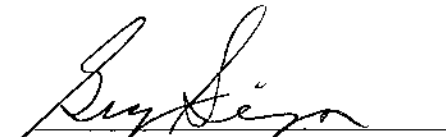
As an example, where criminal and traffic matters comprise a substantial part of the district court's cases, the per diem judge should alert the supervising judge whether the per diem judge/lawyer's practice involves representing clients in criminal and traffic matters which may well result in frequent recusal and whether the supervising judge should consider assigning the per diem judge to handle only civil cases and related matters.

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FOR THE COMMISSION
ON JUDICIAL CONDUCT



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