



Commission on Judicial Conduct | Komikina Lawena Luna Kānāwai

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FORMAL ADVISORY OPINION #26-02 **August 12, 2026**

DISQUALIFICATION OF JUDGES WHO **WERE FORMER GOVERNMENT ATTORNEYS**

INTRODUCTION

A judge who previously worked as a government attorney is not automatically disqualified from presiding over proceedings involving the judge's former office for a set period of time. Disqualification of a judge is determined by assessing whether the judge's impartiality might reasonably be questioned, including but not limited to the circumstances set out in Rule 2.11 of the Hawai'i Revised Code of Judicial Conduct ("Code").

REQUEST FOR ADVICE

The Commission on Judicial Conduct ("Commission") has been asked to provide guidance on whether former government attorneys are disqualified from presiding over proceedings involving their former office for set periods of time after becoming a 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.

"Government attorney" means an attorney employed with any state or county office, including but not limited to the offices of the Prosecutor, Public Defender,

Corporation Counsel, and Attorney General.

“Appearance of impropriety” means conduct that reasonable minds, with knowledge of all the relevant circumstances, would perceive as materially impairing the judge’s independence, integrity, impartiality, temperament, or fitness to fulfill the duties of judicial office.

APPLICABLE CODE AND RULES

Rule 2.7, Responsibility to Decide, provides that “[a] judge shall hear and decide matters assigned to the judge, except when disqualification or recusal is required or permitted by Rule 2.11 or other law.”

Rule 2.11(a), Disqualification or Recusal, provides in pertinent part:

(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.

. . . .

(6) The judge:

(A) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

(B) served in governmental employment and in such capacity, participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;

(C) was a witness concerning the matter; or

(D) on appeal, previously presided as a judge over the matter in another court.

Rule 2.11(c), Disqualification or Recusal, provides in pertinent part:

(c) A judge subject to disqualification or recusal under this Rule, other than for bias or prejudice under Rule 2.11(a)(1), may disclose on the record the basis of the judge’s disqualification or recusal and may ask the

parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification or recusal. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified or recused, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

ANALYSIS AND ADVISORY

A judge must consider disqualification or recusal under Rule 2.11 when presiding over matters that are similar to those the judge previously dealt with as an attorney. In past informal advice, the Commission cautioned new judges who were former prosecutors or public defenders that they should refrain from presiding over criminal matters for a period of two years. Similarly, for new judges who previously worked in the offices of the Attorney General or Corporation Counsel, the Commission informally advised that they refrain from presiding over cases where their former government employer was a party for two years. In providing this informal advice, the Commission did not find that presiding in all such cases would be in violation of the Code. Rather, the Commission provided a safe harbor to avoid any appearance of impropriety.

The Commission now finds that this informal advice has the potential to result in disqualifications or recusals that are not required by Rule 2.11. Such disqualifications may cause unnecessary difficulties for neighbor island courts where there are fewer judges. The Commission has considered the practice in other states and now brings its guidance to conformity with the majority practice.¹

Standing alone, prior employment with a particular government office does not require a judge to disqualify from proceedings involving that office. Rather, a judge formerly employed by a government agency should consider each part of Rule 2.11(a)(1) and (a)(6).

Pursuant to Rule 2.11(a)(1), the judge must disqualify or recuse where the

¹ See Cynthia Gray, *Disqualification Issue Faced by New Judges*, Judicial Conduct Reporter, Volume 32, Fall 2010, at 10.

judge has a personal bias or prejudice for or against a party or a party's lawyer, or personal knowledge of the facts in dispute in the proceeding. Personal knowledge of the facts in dispute can be gained by having been counsel on the matter, having acted as a supervisor of the matter, having screened the case or given advice on the case, or having confidential information regarding the parties, witnesses, or counsel on the case. The Commission advises that in such circumstances, the judge should disqualify or recuse and should not make a disclosure seeking waiver under Rule 2.11(c).

Pursuant to Rule 2.11(a)(6)(B), the judge must disqualify or recuse where the judge, while serving in government employment, participated personally and substantially as a lawyer or public official concerning the proceeding. Personal participation includes having been counsel on the matter, having acted as a supervisor of the matter, having screened the case or given advice on the case, or having confidential information regarding the parties, witnesses, or counsel on the case. The Commission advises that where there was personal and substantial participation in the matter, the judge should disqualify or recuse and should not make a disclosure seeking waiver under Rule 2.11(c).

The Commission notes that Rule 2.11(a)(6)(B) does not require a former government lawyer to disqualify on matters on which the judge did not have personal and substantial participation.² While personal participation is readily defined, substantial participation is not. The Commission advises that there may be circumstances where the judge's impartiality might reasonably be questioned by reason of the judge's former government employment. As an example, a judge who served as a supervisor may not have acquired any personal knowledge concerning the case. In such circumstances, where the judge believes that they can be fair and impartial, the judge may make a disclosure seeking waiver under Rule 2.11(c).

² By way of comparison, Rule 2.11(a)(6)(A) provides that judges must disqualify or recuse themselves if they were associated with a lawyer who participated substantially as a lawyer in the matter during such association. This Formal Advisory Opinion does not change the informal advisories given to judges who were former attorneys in private practice.

CONCLUSION

In summary, a judge who was previously a government attorney is not bound by any temporal constraints in presiding over matters involving the judge's former office.

Pursuant to Rule 2.11(a)(1), the judge must disqualify or recuse where the judge has a personal bias or prejudice for or against a party or a party's lawyer, or personal knowledge of the facts that are in dispute in the proceeding.

Pursuant to Rule 2.11(a)(6)(B), the judge must disqualify or recuse themselves where the judge, while serving in government employment, participated personally and substantially as a lawyer or public official concerning the proceeding.

There are circumstances in which a judge's impartiality might reasonably be questioned even though the judge did not have personal and substantial participation in the matter. In such circumstances, where the judge believes that they can be fair and impartial, the judge may make a disclosure seeking waiver under Rule 2.11(c).

FOR THE COMMISSION ON JUDICIAL CONDUCT

/S/ Lisa W. Munger

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