

Opinion No. 07-01
June 29, 2007

- Topic: Duty of a judge to disqualify when negotiating future employment with a firm that appears before the judge.
- Digest: A judge is disqualified from proceedings in which a law firm appears when the judge is negotiating future employment with the firm.
- References: Illinois Supreme Court Rule 63C(1); Bender v. Board of Fire and Police Commissioners, 254 Ill. App. 3d 488, 491 (1st Dist.1993); Pepsico v. McMillen, 764 F.2d 458 (7th Cir. 1985); In re Continental Airlines, 901 F.2d 1259 (5th Cir. 1990); Voeltz v. Morrell, 564 N.W. 2d 315 (S.D. 1997); Illinois Rules of Professional Conduct, Rule 1.12(b); 1990 ABA Model Code of Judicial Conduct, Canon 3E(1).

FACTS

In preparation for retirement, a judge plans to make preliminary inquiries with local law firms regarding the possibility of post-retirement employment. Serious negotiations and a final employment decision will be delayed until after the last day of the judge's judicial service. Some of the firms with which the judge plans to discuss prospective employment have matters pending before the judge.

QUESTION

Does a preliminary discussion with a law firm regarding possible future employment require a judge to disqualify from matters in which the firm appears?

OPINION

Supreme Court Rule 63C(1) provides that a judge shall disqualify himself or herself from any "proceeding in which the judge's impartiality might reasonably be questioned." Subparagraphs (a) through (e) of Rule 63C(1) identify specific situations in which partiality is presumed and disqualification mandated. The subparagraphs do not address the situation presented here, where a judge is in contact with prospective future employers. Nor does the Comment to Rule 63C discuss the likely impact that employment discussions might have on the objective, reasonable person's opinion of the judge's impartiality when a potential employer appears before the judge.

Some guidance is provided by the Commentary to Canon 3E(1) of the 1990 ABA Model Code of Judicial Conduct:

For example, if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that law firm appeared, unless the disqualification was waived by the parties after disclosure by the judge.

Under this provision, disqualification would appear to be required whenever a judge is negotiating for employment with a law firm even if the employment discussions are in an initial or early stage. This interpretation is consistent with court decisions considering the issue. For example, in Pepsico v. McMillen, 764 F.2d 458 (7th Cir. 1985), a "headhunter" retained by a judge contacted both firms on trial before the judge to determine if either firm was interested in discussing future employment of the judge. The Court of Appeals determined that under the circumstances the trial judge's impartiality could reasonably be questioned even though (1) one firm never returned the headhunter's telephone call, (2) the other firm replied that it was not interested in employing the judge, (3) the judge was unaware that the headhunter contacted the firms, and (4) contact with the firms was admittedly "preliminary, tentative, indirect and unauthorized." Other courts have similarly endorsed a strict rule requiring disqualification when a preliminary contact regarding future employment has been initiated. See In re Continental Airlines, 901 F.2d 1259 (5th Cir. 1990) (appearance of justice requires that a judge not explore prospective employment with lawyers appearing before him); Voeltz v. Morrell, 564 N.W.2d 315 (S.D. 1997) (judge disqualified although she called the prospective employer who was a litigant before the judge and advised that she did not want to discuss an offer, or even whether an offer would be made, until the case was concluded); see also Bender v. Board of Fire and Police Commissioners, 254 Ill. App. 3d 488, 491 (1st Dist. 1993) ("Similarly, for judges, 'recusal is required when, at the very time . . . of trial before a judge, he is in negotiation . . . with a lawyer or law firm or party in the case over his future employment'.") (quoting Pepsico v. McMillen, 764 F.2d 458, 461 (7th Cir. 1985); Illinois Rules of Professional Conduct, Rule 1.12(b) ("A lawyer shall not negotiate for employment with any person who is involved as a party or lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge, other adjudicative officer, or arbitrator.").

Disqualification, however, is not required unless a judge solicits or at least encourages discussions concerning possible future employment. Without some participation by the judge, or the judge's agent, in the negotiation process, the judge's impartiality cannot be reasonably questioned. Accordingly, disqualification is unnecessary where a law firm unilaterally

and independently seeks to engage a judge in employment discussions and the judge politely but unequivocally declines the invitation.

CONCLUSION

A judge's impartiality is reasonably questioned when a law firm appears before a judge and the judge is in negotiations, even preliminary negotiations, with the firm for future employment. Disqualification from matters involving the firm is not required, however, unless the judge or judge's agent solicits or invites the contact or otherwise participates in the employment discussion. An unsolicited approach by a firm or lawyer that is unequivocally and immediately terminated by the judge does not give rise to a reasonable question as to the judge's impartiality and therefore does not require the judge's disqualification.