

Opinion No. 07-03  
September 7, 2007

Topic: Recusal, Remittal of Disqualification

Digest: A judge, who is in the midst of a dissolution of marriage discovers that the attorney who represents his spouse will be appearing before him on a regular basis, is disqualified, but, absent any personal bias or prejudice, should remit the disqualification to the parties and counsel.

A disqualified judge may enter ministerial orders, such as scheduling of a hearing date or continuing a hearing on a substantive matter, while parties are considering the judge's remittal of disqualification

References: Illinois Judicial Ethics Committee Opinions Nos. 95-02, 96-22; Illinois Code of Judicial Conduct, Rules 63 (C)(1) and D; Shaman, Lubet & Alfini, *Judicial Conduct and Ethics*, §4.25. (2<sup>nd</sup> ed., 1995).

#### FACTS

A Judge has just been given a new assignment as the presiding judge in a rural county. The judge has learned that the attorney who is representing his wife in their current dissolution of marriage action regularly practices in the court of that rural county and will be appearing frequently before the judge. The dissolution is neither bitter nor amicable. The judge is represented by counsel and indicates that he feels no prejudice or personal bias toward the individual attorney representing his soon-to-be-ex-wife. The judge inquires as to whether he has an obligation to recuse himself in cases where the attorney represents a party before him.

#### QUESTION

Must a judge disqualify himself in a case when the attorney, who represents his estranged spouse in their

dissolution of marriage, when the attorney appears before him representing another party?

If not, may the judge enter ministerial orders pending the parties' decision on a remittal of disqualification?

#### ANALYSIS

Rule 63(C)(1) is the governing standard. IJEC Opinion No. 96-22 concluded that:

Absent personal hostility toward the lawyer or a manifestation of impartiality, disqualification is not required of a judge when a lawyer who represented the judge's former spouse in the judge's dissolution of marriage appears before the judge representing other clients in unrelated matters.

However, in the text of the Opinion, the scope of the opinion is limited to matters that have been concluded:

Were the representation of the judge's former spouse on matters relating to the dissolution either on going or current, IJEC Opinion 95-2 would support the conclusion that it is unreasonable for the judge to preside over a case where one of the parties is represented by the lawyer.

IJEC Opinion No. 95-02 stands for the proposition that it is per se unreasonable for a judge to hear a case where one of the attorneys is currently representing the judge:

The appearance before a judge of a lawyer who represents the judge involves a situation where the judge's impartiality might reasonably be questioned....

Following the analytical structure outlined in Opinion 96-22 and expanding the principle incorporated from Opinion 95-02, one must conclude that, under Rule 63(C)(1) a judge's impartiality might reasonably be questioned. This is because Opinion 96-22 directs that the "reasonableness standard" is that of the objective reasonable person on the street ("whether an objective, disinterested observer fully

informed of the relevant facts would entertain a significant doubt that the judge in question was impartial." Shaman, Lubet & Alfini, *Judicial Conduct and Ethics*, §4.25. (2<sup>nd</sup> ed., 1995)).

However, as noted in Opinion 96-22, this fact situation is at least one-step away from the attorney representing the judge directly. Therefore, it is appropriate to apply Rule 63(D) to the situation.

Here, the judge has indicated that the judge has no personal bias or prejudice concerning the attorney representing his wife in the dissolution of marriage. Therefore, it would be appropriate for the judge "to disclose on the record the basis of the judge's disqualification" and "ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification." This procedure is pursuant to Rule 63(D).

The judge further inquired whether the judge would be prohibited from taking any ministerial action on the pending cases while the parties were considering the remittal of disqualification. It seems unreasonable to say that a judge who notifies parties that he is or will be remitting a disqualification to them would then be barred from entering an order continuing the matter or setting another date for a hearing or entering some other non-final agreed order while the parties are considering the remittal.

#### CONCLUSION

It is not inconsistent with Rule 63(C) and (D) for a judge who is disqualified, but tendering a remittal of disqualification to the parties to enter ministerial or agreed orders pending the parties' response to a remittal of disqualification.