

Judge Conflicts

Former Public Defender or State's Attorney

2003-02: Disqualification of Judge Formerly Employed as a Public Defender and Assistant State's Attorney

DISCLAIMER: This Opinion interprets the 1993 Illinois Code of Judicial Conduct, which was superseded on January 1, 2023, by the 2023 Illinois Code of Judicial Conduct. This Opinion does not consider or address whether the 2023 Code affects the analysis or conclusion of the Opinion. A table cross-referencing the 1993 Code to the 2023 Code can be found at IJEC CORRELATION TABLE.

IJEC Opinion No. 2003-02

May 7, 2003

TOPIC

Disqualification of judge formerly employed as a public defender and assistant state's attorney.

DIGEST

A judge, formerly employed as an assistant state's attorney and public defender, is not disqualified from hearing cases involving defendants the judge previously prosecuted or defended unless the judge personally participated in the prosecution or defense of the case currently before the court.

FACTS

A new judge who formerly served as a public defender and assistant state's attorney presides over a felony court call. Cases assigned to the judge include defendants who the judge either prosecuted as an assistant state's attorney or represented as the public defender.

QUESTION

Is the judge who formerly served as a public defender and assistant state's attorney, disqualified from hearing cases involving defendants previously defended by, or prosecuted by, the judge?

OPINION

Supreme Court Rule 63C(1)(b) provides in pertinent part:

C. Disqualification

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality may reasonably be questioned, including but not limited to instances where:

* * *

(b) the judge served as a lawyer in the matter in controversy...

Under Rule 63C(1)(b), a judge, who before assuming the bench, "served as a lawyer in the matter in controversy" is disqualified from presiding over the same matter. In construing the requirement of disqualification for prior involvement in a case, the Illinois Supreme Court has held that disqualification is not required if the judge's prior contact with the case was so limited that it did not constitute "service as a lawyer" in the case.

People v. Del Vecchio, 129 Ill.2d 265, 277 N.E.2d 32 (1989) (Merely having previous involvement in a defendant's case does not require disqualification. The important issue is whether the judge acted as counsel in the previous case.)

For example, where a judge in a prior capacity as an assistant state's attorney had only supervisory authority over a case and did not directly participate in the prosecution, the judge is not disqualified from presiding over the same case. People v. Del Vecchio, supra, (trial judge was supervisor in State's Attorney's office and approved expedition of the defendant's indictment);

People v. Thomas, 199 Ill.App.3d 79, 556 N.E.2d 1246 (2nd Dist. 1990) (trial judge as chief of the criminal division of the State's Attorney's office had supervisory authority over the defendant's case but no personal involvement in prosecuting the case).

However, where a judge, as a public defender or assistant state's attorney, has personally participated at any stage of a case, the judge is deemed to have served as a lawyer in the case and is therefore prohibited by Rule 63C(1)(b) from presiding over the same case. See People v. Austin, 116 Ill.App.3d 95, 451 N.E.2d 593 (2nd Dist. 1983) (personal participation by the trial judge as an assistant public defender at defendant's preliminary hearing, although brief, constituted "serving as counsel" and therefore disqualified the judge from presiding over a petition to revoke probation in the same case), People v. Vasquez, 307 Ill.App.3d 670, 718 N.E.2d 356 (2nd Dist. 1999) (trial judge's appearance as an assistant state's attorney at a single status hearing was sufficient to constitute "service as a lawyer" in the case).

Illinois Judicial Ethics Committee Opinion No. 95-20 (former assistant public defender now serving as a judge may hear cases in which a defendant is represented by the

public defender's office so long as the judge had no personal involvement with the pending case).

In further construing the Rule 63C(1)(b) requirement of disqualification for prior involvement in a case, the Illinois Supreme Court has interpreted the phrase "matter in controversy" in a very limited manner so as "to encompass the case currently pending before the court". *People v. Storms*, 155 Ill.2d 498, 504, 617 N.E.2d 1188 (1993).

Therefore, so long as the judge did not serve as a lawyer in the case before the court, the fact that the judge prosecuted the defendant previously does not require recusal under Rule 63C(1)(b). *People v. Eubanks*, 307 Ill.App.3d 39, 716 N.E.2d 1253 (3rd Dist. 1999).

This is true even where the previous prosecution resulted in a conviction and that conviction is used in aggravation at the sentencing hearing currently before the court. *People v. Storms*, supra, 155 Ill.2d at 503-505 and *Del Vecchio v. Department of Corrections*, 31 F.3d 1363 (7th Cir. 1994).

However, a judge who served as a prosecutor or public defender in a case cannot later preside over a post-conviction petition attacking the conviction obtained in the case. *People v. Vasquez*, 307 Ill.App.3d 670, 718 N.E.2d 356 (2nd Dist. 1999) (post-conviction proceeding is "sufficiently related" to the original prosecution to fall within the scope of Rule 63C(1)(b)).

Nor can a judge who served as a prosecutor in a criminal case later preside over a sexually violent persons commitment proceeding which is based upon the same criminal case. *People v. Hargett*, ___ Ill.App.3d ___, 786 N.E.2d 557 (3rd Dist. 2003).

In sum, under Rule 63C(1)(b), a judge is not disqualified from presiding over a case unless the judge as an assistant state's attorney or public defender personally participated in the prosecution or defense of the case currently before the court.

Other reasons may exist for a judge to disqualify because of prior representation or prosecution of a defendant. Where a judge harbors a personal bias or prejudice against a defendant developed during prior service as a state's attorney or public defender, Rule 63C(1)(a) requires disqualification. Similarly, if a judge represented a co-defendant in case currently before the court, the judge might possess personal knowledge regarding disputed facts concerning the case requiring disqualification under Rule 63C(1)(b). In the rare case where a judge is unable to set aside information or confidences received from a client in a prior case and decide the current case only on what is presented in court, recusal, of course, would be required. See Committee Commentary to Rule 63 (judge must consider only the evidence presented). Cf. *People v. Coleman*, 168 Ill.2d 509, 540-541, 660 N.E.2d 919 (1995) (to conclude that a judge could not set aside personal feelings and act in an impartial manner give little credit to the temperament and integrity of members of the bench).

1995-20: Duty of Judge, Who Was Formerly in the Public Defender's Office, to Disqualify from Cases Where That Office Now Represents a Defendant

IJEC Opinion No. 1995-20

October 12, 1995

DIGEST

A new judge who had been an assistant public defender before becoming a judge is not disqualified from hearing a case in which that office represents a defendant so long as the judge never represented the defendant in the matter now before the judge.

1998-07: Is a Judge Disqualified in Criminal Cases Where the Newly Elected State's Attorney was, within the Last Three Years, the Judge's Associate in the Private Practice of Law

IJEC Opinion No. 1998-07

April 8, 1998

1. Is a judge disqualified from hearing criminal cases argued by the newly elected State's Attorney who was his former partner?

Yes, a judge is disqualified from hearing criminal cases argued by the newly elected State's Attorney who was his former partner within the preceding three years.

2. Is a judge disqualified from hearing criminal cases argued by the newly elected State's Attorney who was his former associate?

Yes, a judge is disqualified from hearing criminal cases argued by the newly elected State's Attorney who was a former associate within the preceding three years.

3. Is the judge still disqualified if the cases are actually prosecuted by an Assistant State's Attorney?

No, the judge is not disqualified if the prosecutor in court is an assistant rather than the elected State's Attorney who had been the judge's former associate.

4. Would disclosure help?

Yes, disclosure would help and in fact is required as to the elected State's Attorney who had been the judge's former associate.
