



Indiana Judicial Nominating Commission Indiana Commission on Judicial Qualifications

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ADVISORY OPINION

Code of Judicial Conduct
Canon 3

#3-89

The Indiana Commission on Judicial Qualifications issues the following advisory opinion concerning the Code of Judicial Conduct. The views of the Commission are not necessarily those of a majority of the Indiana Supreme Court, the ultimate arbiter of judicial disciplinary issues. Compliance with an opinion of the Commission will be considered by it to be a good faith effort to comply with the Code of Judicial Conduct. The Commission may withdraw any opinion.

ISSUE

Several former prosecuting attorneys, now judges, have asked the Qualifications Commission for advice concerning the necessity of their disqualification in criminal proceedings when:

1. The judge was the elected Prosecuting Attorney when a pending case was commenced or filed.
2. The judge was a deputy prosecutor when the case was commenced or filed.
3. The judge was Prosecutor or deputy prosecutor not when the pending case was commenced or filed, but when the prosecution of an underlying offense was commenced or filed.
4. The judge was involved in unrelated prosecutions of the defendant.

ANALYSIS

Each of these issues involves a two-fold analysis under Canon 3 to determine whether disqualification is necessary. The question is whether the judge was an attorney in the matter in controversy, Canon 3C(1)(b), and, in any case, might the impartiality of the judge who does not disqualify reasonably be questioned. Canon 3C(1). Also, the Commission is mindful of the tension in this area between rules of disqualification and a quick and efficient administration of justice, which is hampered when judges must recuse themselves.

1. Several judges who are former elected county Prosecutors have found themselves presented with cases filed during their prosecutorial terms.

These judges must disqualify themselves. See, Calvert v. State (1986) Ind. App., 498 N.E.2d 105. A former Prosecuting Attorney is disqualified from any criminal proceeding initiated, investigated, filed, or pursued by the office of the Prosecuting Attorney during the judge's term as prosecutor. Even if the prosecutor did not actively prosecute the cause or has no recollection of it at all, disqualification is necessary. First, the elected Prosecuting Attorney is considered to be "of counsel" in all cases in the office, so disqualification is necessary pursuant to Canon 3C(1)(b). See, Advisory Opinion #1-89, Indiana Commission on Judicial Qualifications. Second, the ideals of judicial independence and the appearance thereof are accomplished only upon the disqualification of a former Prosecuting Attorney in a case filed during his term. All cases must be tried before an impartial and disinterested tribunal which should also appear to be fair and will preserve the public's confidence in the independence of the judiciary. The Commission would adopt a per se rule of disqualification in this instance.

2. Where the judge was a deputy prosecuting attorney at the time the case at bar was initiated, investigated, filed, or otherwise pursued, he is not necessarily disqualified as the judge. So long as the deputy played no role at all in the case while in the prosecutor's office, Canon 3C(1)(b) will not require disqualification, and, given there are no other disqualifying factors, the former deputy may entertain the case as judge without raising reasonable doubts about impartiality. Despite the former service as deputy prosecutor, the judge is, of course, presumed to be impartial. And, given the numbers of former deputies who become judges and the presumed distance one deputy has from cases which happened to be pending during his term but in which he was not engaged, the need for an efficient administration of justice dissuades the Commission from formulating a rule of disqualification in these cases.

3. The third question is whether the answers to Issues 1 and 2 apply similarly to the situation in which the pending case was not in the prosecutor's office during the judge's term as prosecutor, but an underlying offense was. The specific examples which have come to the Commission's attention involve a judge who prosecuted one of the felonies which is pleaded by the State in a habitual offender charge, a judge who prosecuted the defendant on a misdemeanor drunken driving charge which is now being used to enhance the current offense to a felony, and a judge who prosecuted a traffic offense which, in part, led to a driver's administrative suspension which is being challenged in the judge's court.

As in Issue 1, a judge is disqualified in these proceedings unless, as in Issue 2, the judge was a deputy prosecutor and was not involved in the underlying prosecution. First, the judge who was Prosecutor during the prosecution of the underlying offense or was a deputy involved in the prosecution may have been an attorney in the matter in controversy by virtue of his prosecution of the underlying offense. As such, the judge is disqualified under 3C(1)(b). However, the analysis does not depend upon a showing that the underlying offense is actually "in controversy", for the judge is disqualified because his impartiality

reasonably can be questioned. A judge who has had a prosecutorial interest in any aspect of proceedings over which he later presides damages the public's confidence in the independence and integrity of the judiciary. Even if the facts of the underlying offense are conceded or stipulated, a judge who played a part in the underlying prosecution, or was the elected Prosecutor when the prosecution of the underlying offense was commenced, is disqualified.

4. Finally, the question is the necessity of disqualification of a judge who was involved in unrelated prosecutions of the same defendant. Here, as in Issue 2, the Commission will not adopt a per se rule of disqualification. Given the rate of recidivism and the volume of cases a prosecutor will handle during a term in office, the efficient administration of justice would suffer greatly under a rule that a judge could not entertain a case involving a defendant he had prosecuted on an unrelated charge. However, the judge should consider carefully whether, as prosecutor, he gained information about the defendant which could pertain to the instant case. He should consider the numbers of prosecutions he handled against the defendant, how long ago they occurred, whether they were notorious or well-publicized prosecutions, and, of course, whether he developed any personal biases against the defendant.

CONCLUSION

A former elected Prosecuting Attorney is disqualified as judge from any criminal case commenced during the judge's prosecutorial term or from any case built upon an underlying offense, the prosecution of which was commenced during the judge's prosecutorial term.

A former deputy prosecuting attorney is not necessarily disqualified from a criminal case commenced during the judge's term as deputy, or from a case built upon an underlying offense, the prosecution of which was commenced during the judge's term as deputy prosecutor, so long as the judge was not involved at all in the prosecution.

A judge who was involved in unrelated prosecutions of a defendant is not necessarily disqualified from proceedings involving the same defendant.