

Advisory Opinion #2019-01

(adopted February 7, 2019)

Question: *When a former public defender becomes a judge what disqualification is mandated under Alaska law and the Code of Judicial Conduct?*

Opinion: Conflicts for judges in Alaska are governed by both statute and the Alaska Code of Judicial Conduct. The statute, AS 22.20.020, establishes various grounds for disqualification of a judge. In establishing grounds for disqualification, the statute sets out timeframes affecting new judges to provide distance for the judge from the judge's prior active practice of law. While many of the grounds set out for disqualification do not distinguish between public agencies and private law firms, there are two provisions that do.

In subsection (a)(5), the statute states that a judge may not act in a matter in which "a party, except the state or a municipality of the state, has retained or been professionally counseled by the judicial officer as its attorney within two years preceding the assignment of the judicial officer to the matter." This statutory provision requires prior public defenders to not hear matters involving their former clients for 2 years after becoming a judge unless the disqualification is waived. Similarly judges who were in private practice have a conflict with previous clients who may appear in front of them in new matters up to 2 years later. Former prosecutors or other government lawyers who represented the state or a municipality do not need to be concerned if those entities come before them in matters unless there is another basis for disqualification.

The rationale for this distinction is clear. It would be impractical for prior government lawyers to sit on entire types of cases if excluded from the entire government they represented. So too, we can assume that it is unlikely that representing an abstract entity, like a state or municipality creates the allegiances and closeness that representing an individual party does. While a former public defender may not easily recall all of the clients that they represented in the two years before becoming a judge, it is not an undue burden on that new judge to give notice and recuse.

Subsection (6) is the other parallel provision in the statute that distinguishes government parties and applies when the judge represented someone against a party currently before the judge. This section provides "the judicial officer has represented a person as attorney for the person against a party except the state or a municipality of the state, in a matter within two years preceding the assignment as judicial officer to the matter." Because the public defender represented individuals against the state, this provision appears to be designed to recognize that public entities, again, do not create the same conflicts as private clients.

Another provision of the statute proves more problematic. Subsection (a)(8) of the statute prohibits a judge from acting in a matter in which “the law firm with which the judicial officer was associated in the practice of law within the two years preceding the filing of the action has been retained or has professionally counseled either party with respect to the matter.” The statute does not explicitly define “law firm” as a private entity, and in fact, under ethical rules governing the conduct of lawyers, government agencies are considered law firms for purposes of determining conflicts. By reading this section in conjunction with subsection (5) it can be inferred that this provision was not intended to extend to lawyers who previously represented the state or a municipality of the state. The question remains, however, whether the public defender agency (the state’s largest law firm) was intended to be covered by this provision. If so, any former public defender could not sit on any matter where a public defender appears for two years, regardless of who the client is.

In the Commission’s opinion, the public defender agency should not be considered a “law firm” for purposes of judicial disqualification. There are many reasons why a former private lawyer should not consider matters involving that lawyer’s previous firm for the first two years. Pending matters before the firm may remain unsettled for a time, with resulting remunerations due to the new judge. So too, a private law firm is a business enterprise where the members not only share legal expertise, but close financial relationships. None of those interests are present in the public defender agency. Public defenders are salaried state employees in the same way their counterparts in the prosecutor’s office are. Their relationships with their colleagues are no different from the relationships that colleagues who represent government parties may have.

Because there is no public policy or ethics concern that would reasonable require the public defender agency to be treated as a law firm under the statute and interpreting the statute otherwise creates a formidable barrier to public defenders who may be selected to serve as a judge, the Commission does not believe that the statute should be interpreted to include the public defender agency as a law firm for disqualification purposes.