



Ohio Board of Professional Conduct



OHIO ETHICS GUIDE
TRANSITION FROM THE
PRACTICE OF LAW TO THE BENCH

Introduction

After winning a judicial election or being appointed by the governor to fill a vacancy, an incoming judge should immediately focus on the steps necessary to wind up his or her practice. Fulltime judges are prohibited from practicing law, and given the express requirements applicable to withdrawing from representation and the fact that judges are held to the highest ethical standards, the transition period from lawyer to judge requires significant preparation.

This ethics guide provides a general overview of the ethical obligations of a newly elected or appointed judge with regard to the judge's transition to the bench. Because each circumstance is different, a new judge is encouraged to contact the staff of the Board of Professional Conduct with specific questions that arise during the transition phase.

Prohibition Against Practicing Law

An important rule in the Code of Judicial Conduct for all fulltime judges is the prohibition against practicing law.¹ This prohibition attaches after the incoming judge receives and files the Governor's commission, takes the oath of office, and assumes judicial office. Once those events occur, the judge can no longer represent clients, give legal advice, or engage in any other activities that constitute the practice of law. However, a judge may act *pro se* in matters involving litigation in courts and before governmental agencies.

Additionally, a judge may give a member of his or her family legal advice and draft and review documents without receiving compensation, but may not appear on their behalf before any court or agency.¹

At no time may a judge, when acting *pro se* or assisting family, abuse the prestige of office to advance either the judge's personal or family interests.²

¹ Jud.Cond.R. 3.10.

² Jud.Cond.R. 1.3. See "member of family", Jud.Cond.R., *Terminology* (spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship).

Winding Up Your Law Practice

► Duties to the Client

When leaving the practice of law, an incoming judge must take all reasonably practicable steps to protect the interests of his or her active clients.³

These steps include:

- 1 Informing clients in writing of the change in circumstances;
- 2 Properly withdrawing from pending cases;
- 3 Providing clients adequate time to employ new counsel;
- 4 Returning client property and files; and
- 5 Refunding any fees or expenses that have not been earned or incurred.⁴

The incoming judge should emphasize in the written notification to clients that he or she cannot continue to represent or advise them after taking the bench. This applies to any legal work that may be construed as ministerial or even limited in scope.

In the interim period between appointment or election and formally taking office, an incoming judge may continue to practice law. However, because the time available to wind up a practice is usually limited to a few days or weeks, the incoming judge should ascertain which matters can be completed prior to taking the bench. Any legal work that was not completed for clients cannot, under any circumstances, be finished by the judge after taking office.⁵

³ Prof.Cond.R. 1.16.

⁴ *Id.*; Prof.Cond.R. 1.15.

⁵ *Disciplinary Counsel v. Bender*, 139 Ohio St.3d 332, 2014-Ohio-2118.

NOTE: Ethics Guides address subjects on which the staff of the Ohio Board of Professional Conduct receives frequent inquiries from the Ohio bench and bar. The Ethics Guides provide nonbinding advice from the staff of the Ohio Board of Professional Conduct and do not reflect the views or opinions of the Board of Professional Conduct, commissioners of the Board, or the Supreme Court of Ohio.

To ease the transition for clients, the incoming judge may assist them in the transfer of matters to recommended new counsel or counsel chosen by the client. When matters are referred to new counsel, there may be situations when counsel needs to confer with the judge about questions related to the file or the judge's prior representation of the client. Limited discussions between the new counsel and judge are permitted, as long as the judge does not engage in a discussion about the merits of the case, give legal advice, or discuss future legal strategy with the new counsel.

► Client Files

Prior to taking the bench, the incoming judge should make arrangements for clients to obtain their open files. The letter informing clients of the judge's change in circumstances should include directions for obtaining the client's file. When a file is returned, the client should be asked to sign a receipt or acknowledgement of the return that lists the general contents of the file. If the incoming judge has implemented a record retention policy, any closed files kept in storage should promptly be returned to clients. Reasonable efforts should be undertaken to find the former clients in order to return both open and closed client files.

If clients with closed files cannot be located, steps should be taken to preserve or transfer the possession of original documents like contracts, wills, and deeds. If there are situations where a client is unable to physically retrieve the file, it is recommended that the judge make arrangements for the file to be either mailed or picked up at a location other than the courthouse or chambers.⁶

► IOLTA

If the incoming judge maintains an IOLTA, any unearned fees and client property held must be accounted for and promptly returned to the client.⁷ If possible, the incoming judge should finalize IOLTA accounting and disbursements to clients prior to taking the bench. If funds remain in the IOLTA after

undertaking reasonable efforts to locate the client, the funds should be transferred to the Ohio Department of Commerce as unclaimed funds.⁸ The return or transfer of client funds does not relieve the judge of his or her responsibility to maintain all IOLTA records for a period of seven years after the termination of representation.⁹

► Law Firm Financial Matters and Interests

Leaving or closing a law practice may involve the winding up of financial matters and the transfer of financial interests relative to the judge's former law firm. Because some financial activities or interests could serve as a future basis for disqualification, an incoming judge must consider the timing and resolution of financial matters and interests related to his or her former law practice.¹⁰

Generally speaking, a judge is permitted to receive outstanding fees and earnings or other benefits from a former law firm. However, the judge should recuse himself or herself from cases involving the former law firm while the judge has a continuing financial relationship with the law firm.

- *Earned Fees and Pending Settlements*

It is not uncommon for the incoming judge to leave private practice and have earned but uncollected fees or outstanding settlement proceeds related to client matters. A judge may receive fees for legal work completed prior to becoming a judge.¹¹ In situations involving a contingency fee, a judge may be entitled to a fee on a *quantum meruit* basis for services performed before taking judicial office, but only after the contingency occurs.¹²

However, disqualification is required in cases advocated by the judge's law firm when he or she is receiving income from the firm.¹³ If practicable,

⁶ See generally, Ohio Bd. of Prof. Cond. Ethics Guide: Client File Retention (2016).

⁷ Prof.Cond.R. 1.15; 1.16(d).

⁸ Adv. Op. 2008-03.

⁹ Prof.Cond. R. 1.15.

¹⁰ Jud.Cond.R. 3.11.

¹¹ Adv. Op. 2007-2.

¹² *Id.*

¹³ Jud.Cond.R. 2.11(A)(2); see also Jud.Cond.R. 3.11; Adv. Op. 95-3.

the total amount of fees due to the judge should be calculated prior to the judge taking the bench, in order that he or she can better predict when recusal may no longer be necessary.

- *Partnership Interest and Retirement Benefits*

Law firms and lawyers are permitted to enter into agreements concerning partnership interest payouts and retirement benefits. Because the receipt of benefits from a former law firm has disqualification consequences, a new judge should divest himself or herself of all financial interests in any law practice in which the judge has been associated. Under most arrangements, a lawyer leaving a law firm upon taking judicial office may be entitled to a return of his or her share in the partnership or retirement benefits.

If payment of the partnership share and retirement benefits will be made over time, disqualification is required in all matters that involve the judge's former law firm and its lawyers.¹⁴ Unless the judge intends to recuse from all cases involving the former law firm and its lawyers, efforts should be undertaken by the firm and the judge to complete the transfer of retirement or partnership benefits from the former law firm in a reasonable period of time in order to minimize the number of cases in which the judge will be disqualified.¹⁵ Because a judge may not receive a financial benefit from the firm based on profits earned after the judge has taken the bench, the payment of partnership or retirement benefits must be calculated based on activity that occurred while the judge was still a member of the firm.¹⁶

- *Sale of Practice*

A judge is permitted to sell his or her entire former law practice, including all client matters and the good will of the practice.¹⁷ Based on the timing of the appointment or election to the bench, it is likely that a sale of a practice will not be finalized until after the judge formally takes office. Whether the sale price is paid in one lump sum or in payments over time is a factor in determining whether the judge's recusal will be necessary if the purchasing

lawyer or law firm appears before the judge. If the latter, disqualification is necessary because the judge is involved in a continuing business relationship with persons appearing before him or her.¹⁸ Once the transaction is concluded, recusal on this basis is no longer necessary.

► **Former Firm Name**

The name of a law firm cannot contain the name of a lawyer who holds a public office.¹⁹ Consequently, when a judge leaves a law firm, his or her name should not appear in the law firm or partnership name or on the firm's letterhead.²⁰ A new judge should confirm that the former law firm acts in conformity with the rule.²¹

Disqualification in General

A judge is required to disqualify himself or herself in any proceeding in which the judge's impartiality might be reasonably questioned.²² Disqualification may be necessary based upon the nature, degree, and timing of the judge's various prior associations with lawyers and parties in the proceeding. When a judge's impartiality may be reasonably questioned, disqualification is required regardless of whether the circumstances are among those specifically enumerated in the rule.

The key questions for every judge contemplating recusal are: whether he or she believes they can remain impartial; and whether a reasonable person might question the judge's impartiality under the circumstances.

"A judge should step aside or be removed if a reasonable and objective observer would harbor serious doubts about the judge's impartiality."²³ A judge who faces grounds for

¹⁴ Adv. Op. 89-017.

¹⁵ See Jud.Cond.R. 3.11.

¹⁶ *Id.*

¹⁷ Prof.Cond.R. 1.17.

¹⁸ Jud.Cond.R. 3.11.

¹⁹ Prof.Cond.R. 7.5(c).

²⁰ Prof.Cond.R. 7.5; Adv. Op. 87-48.

²¹ See *Ashtabula Cty. Bar Assn. v. Brown*, 151 Ohio St.3d 63, 2017-Ohio-5698.

²² Jud.Cond.R. 2.11.

²³ *In re Disqualification of Lewis*, 117 Ohio St.3d 1227, 2004-Ohio-7359, ¶8

disqualification, other than for personal bias or prejudice, may ask the parties and lawyers to waive disqualification under the remittal process outlined in Jud.Cond.R. 2.11(C).

► Former Clients

On rare occasions, judges may encounter former clients as parties in litigation assigned to his or her courtroom. The amount of time that has elapsed between representation of the former client and the client's appearance before the judge should be taken into consideration for disqualification purposes. The mere fact that the judge formerly represented the party is not automatic grounds for purposes of disqualification, unless the new matter is related to the prior representation or there is a specific showing of bias on behalf of the judge.²⁴ A judge should also consider whether he or she has a continuing duty to a former client that would impact on his ability to fairly and impartially consider the pending matter or give rise to a reasonable question regarding the judge's impartiality. Any such question should be resolved in favor of protecting the interests of the judge's former client and ensuring perceptions of the integrity and impartiality of the proceedings.

► Ongoing Litigation Involving Former Clients

An incoming judge transitioning from private practice may be unable to conclude the representation of all clients with ongoing litigation. In those instances when an ongoing case has been transferred to a new lawyer, the new judge must disqualify himself or herself since the judge formerly acted as a lawyer in the proceeding.²⁵

► Appearance of Attorneys from Former Firm

A new judge is likely to encounter former law firm partners and associates in cases assigned to his or her courtroom. In these situations, the new judge should determine which matters may require disqualification. For example, if a judge was associated with a lawyer who participated substantially in a matter during their association together at a law firm, the Code requires the

disqualification of the judge, subject to any waiver from the parties and counsel.²⁶

Similarly, a judge should not hear a matter involving a former law partner until an appropriate amount of time has elapsed after the judge has assumed the bench. The appropriate amount of time can vary based upon the circumstances. In general, "the more intimate the relationship between a judge and a person who is involved in a pending proceeding, the more acute is the concern that the judge may be tempted to depart from the expected judicial detachment or to reasonably appear to have done so."²⁷ However, "a prior professional relationship between a judge and an attorney will not be grounds for disqualification where that relationship ended some years ago."²⁸

Generally, Board staff has advised new judges to wait a minimum of six months to a year before hearing a matter involving a former law partner, unless a waiver is obtained from the parties. Similar disqualification concerns are not always present with respect to non-partner track lawyers or associates in the former law firm, unless the incoming judge maintained or maintains a close personal or professional relationship with the lawyer.

► Former Prosecutor or Other Government Employment

Many judges transition to the bench after serving as a prosecutor, public defender, or as a lawyer with a public agency. The degree of participation in a matter handled while the judge was a prosecutor, public defender, or public lawyer largely determines whether disqualification should be a consideration. Specifically, the Code directs that a judge should disqualify himself or herself if the judge personally and substantially participated in the matter while serving as a government lawyer or public official.²⁹

With respect to former prosecutors, disqualification is necessary if the judge had previously prosecuted the defendant as counsel for the government and the

²⁶ *Id.*

²⁷ *In re Disqualification of Shuff*, 117 Ohio St.3d 1230, 2004-Ohio-7355, ¶6.

²⁸ *In re Disqualification of Ward*, 100 Ohio St.3d 1211, 2002-Ohio-7467 (disqualification denied when judge's professional relationship with an attorney appearing before him ended seven years prior.)

²⁹ Jud.Cond.R. 2.11(A)(7)(b).

²⁴ *In re Disqualification of Serrott*, 134 Ohio St.3d 1245, 2012-Ohio-6340.

²⁵ Jud.Cond.R. 2.11(A)(7)(a).

same case is now before the judge.³⁰ However, a “judge generally need not disqualify himself from presiding over a criminal matter that, although pending at the time he served as a prosecuting attorney, was one in which he had no direct involvement.”³¹

In addition, a judge need not recuse himself or herself in a case involving the prosecution of a prior defendant in an unrelated criminal proceeding.³² However, disqualification is required if the judge cannot fairly and impartially preside in a new matter involving that same defendant or has made public statements as a lawyer regarding the defendant that would raise a reasonable question regarding the judge’s impartiality.³³

Board staff also has given additional advice to new judges in light of former prosecutorial or public legal employment. For example, a prosecutor who has been elected or appointed as a judge should take immediate steps during the transition period to avoid any personal and substantial participation in any new matters. This may reduce the number of cases in which disqualification is required. In addition, staff have advised that a new judge who had supervisory duties over other public lawyers in a matter now before him or her, but in which he or she did not personally or substantially participate, should disclose the extent of any involvement in the matter to the parties. In such a situation, disqualification of the judge is largely determined on a case-by-case basis after consideration of factors like the degree of his or her approval over trial strategy and methods, the signing of pleadings, and overall decision-making authority in the matter.

In cases where the judge’s name appears on an official document in his or her former capacity as a government lawyer or public official, disqualification is not always required. In those situations, a judge should consider the extent to which he or she may have participated in the underlying matter that gave rise to the creation or issuance of the document.

³⁰ Jud.Cond.R. 2.11(A)(2); *In re Disqualification of Gall*, 135 Ohio St.3d 1283, 2013-Ohio-1319.

³¹ *In re Disqualification of Rasttater*, 127 Ohio St.3d 1215, 2009-Ohio-7205, ¶3.

³² *In re Disqualification of Batchelor*, 136 Ohio St.3d 1211, 2013-Ohio-2626.

³³ Jud.Cond.R. 2.11(A)(7)(b).

Other Financial Matters

► Outside Employment

An incoming judge should consider any ongoing employment or business interests that may be prohibited by the Code, interfere with his or her judicial duties, or lead to frequent disqualification. The Code specifically prohibits a fulltime judge from serving as an employee or independent contractor of any business entity.³⁴ In addition, a judge is prohibited from serving as an officer, director, manager, general partner, or advisor for any business not owned by the judge or held by the judge’s family.

► Real Estate Holdings

A judge may continue to own real estate personally held or as part of a family owned business, unless the interest would require the frequent disqualification of the judge.³⁵ For example, a judge cannot enter into leaseholds with certain tenants, primarily lawyers or parties, who would regularly appear before him or her. A landlord/tenant relationship under these circumstances involves the judge in a continuing business relationship with those appearing before the court and is prohibited by the Code.³⁶ Until the judge can divest himself or herself of the real estate holdings or terminate the leaseholds, the judge must recuse from cases involving lawyers or parties with whom the judge has an ongoing business relationship.

Extrajudicial Activities and Membership in Organizations

An incoming judge should carefully review his or her continued memberships and affiliations with nonprofit or private organizations. A judge generally is permitted to belong to education, religious, charitable, fraternal, or civic organizations not conducted for profit, as well as organizations concerning the law, the legal system, and the administration of justice.³⁷

³⁴ Jud.Cond.R. 3.11.

³⁵ Jud.Cond.R. 3.11.

³⁶ Jud.Cond.R. 3.11(C)(3). *Disciplinary Counsel v. Hoskins*, 119 Ohio St.3d 17, 2008-Ohio-3194.

³⁷ Jud.Cond.R. 3.7.

While a judge's participation in extrajudicial activities generally is permissible, helps integrate judges into their communities, and promotes public understanding and respect for the courts, an incoming judge should ascertain whether continued participation in an organization will interfere with his or her duties, lead to frequent disqualification, or undermine the judge's independence, integrity, or impartiality.³⁸ For example, membership in organizations that publicly advocate on political or controversial issues may imply to the public that the judge would not be fair or impartial when matters concerning the organizations come before him or her.

Lastly, an incoming judge should determine the likelihood of the organization coming before his or her court. For instance, a judge should not serve on the board of a legal aid program or victim advocacy organization since those organizations frequently appear in court on behalf of clients or others involved in court proceedings.

Other considerations for an incoming judge include his or her continued service on governmental committees, boards, or other similar positions to which they have been appointed. A judge may not continue to serve in such a capacity unless the entity concerns the law, the legal system or the administration of justice.³⁹ Additionally, an incoming judge must resign from any organization that practices invidious discrimination based on race, sex, gender, religion, national origin, ethnicity, or sexual orientation.⁴⁰ Determining whether the organization falls within this category requires the judge to look at how the organization chooses its members and other relevant factors.⁴¹

Fiduciary Positions

A new judge must resign from any fiduciary position, like an executor, administrator, guardian, attorney in fact, or other personal representative with the exception of the "estate, trust, or person" of a family member.⁴² If the incoming judge is involved as a fiduciary on behalf

of clients or by court appointment, he or she must resign as soon as reasonably practicable, but not later than six months after assuming office.⁴³ In the case of family, continued service as a fiduciary is permissible, if it will not interfere with the performance of his or her judicial duties or proceedings involving an estate, trust, or ward.⁴⁴

Conclusion

Transitioning from the bar to the bench requires careful attention by the incoming judge to his obligations to clients under the Rules of Professional Conduct with a view to his or her future responsibilities under the Code of Judicial Conduct. Upon election or appointment, the judge should immediately begin preparations for winding up his or her law practice, including closing and transferring client matters, closing the IOLTA, and managing financial issues related to the closing or the sale of the practice.

When an incoming judge assumes the bench, he or she will be faced with possible disqualification issues based upon prior relationships with lawyers and parties. Each situation will require consideration of applicable disqualification rules and the judge's overarching obligation to remain impartial and avoid the appearance of partiality.

Prior to assuming the bench, an incoming judge should examine his or her participation with organizations, as well as any business interests, since application of the Code may require the new judge to modify these affiliations.

Issued December 27, 2017

³⁸ Jud.Cond.R. 3.1, Cmt. [2].

³⁹ Jud.Cond.R. 3.4.

⁴⁰ Jud.Cond.R. 3.5.

⁴¹ Jud.Cond.R. 3.5, Cmt. [2].

⁴² Jud.Cond.R. 3.8(A).

⁴³ Jud.Cond.R. 3.8(C).

⁴⁴ Jud.Cond.R. 3.8(A).



Ohio Board of
Professional Conduct

65 South Front Street • Columbus Ohio • 43215-3431