

COMMITTEE ON CODES OF CONDUCT  
ADVISORY OPINION NO. 102

Representation by the Department of Justice.

When judges are sued in an official capacity, it is not uncommon for representation to be provided by an attorney from the Justice Department (which includes members of the local U.S. Attorney's staff). In the event a Justice Department attorney is assigned to represent a judge, it is not necessary for the judge to recuse in unrelated litigation in which other Justice Department attorneys appear. It may even be unnecessary to recuse from cases handled by the same attorney assigned to represent the judge, depending upon the nature of the representation and the judge's relationship with the attorney.

Judicial disqualification in this situation is guided by the standards set forth in Canon 3C of the Code of Conduct for United States Judges, which provides in relevant part, "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." In the Committee's view, a judge's impartiality cannot reasonably be questioned in unrelated matters handled by the Department of Justice simply because the Department provides representation in a lawsuit naming the judge in an official capacity. When accepting representation by the Department of Justice, a judge is not choosing a personal attorney, and the Department of Justice is not the same as a private law firm. See Advisory Opinion No. 38. Under 28 U.S.C. §§ 516 to 519, the Justice Department has the statutory function to represent officers and agencies of the United States sued in an official capacity.

Nor is disqualification always required in unrelated matters handled by the individual attorney assigned to represent the judge. Numerous lawsuits against judges are filed by disgruntled litigants and are patently frivolous; they are often dismissed promptly and without any discovery on the basis of the judge's absolute judicial immunity. In these instances, a judge often will have little personal contact with the government attorney providing representation. Thus, disqualification is not always required but instead depends on the particular facts and circumstances of the case and the nature of the relationship the judge develops with the attorney.

Similar advice obtains on the related question, whether a judge's colleagues should recuse when a judge is named in a complaint. When a judge is a named defendant, the other judges of that court are not necessarily and automatically disqualified. If the litigation is patently frivolous, or if judicial immunity is plainly applicable, recusal would rarely be appropriate.

When a judge is sued and representation is provided through a local U.S. Attorneys' office the question has arisen whether the judge should seek representation by an attorney from outside his or her own judicial district. In the Committee's view, the Code of Conduct for United States Judges

does not require judges to seek representation by government attorneys outside of their districts. But when a judge accepts government representation, he or she must be attentive to situations that require disqualification under Canon 3C(1).

Although disqualification is not routinely required from unrelated matters handled by a government attorney assigned to represent a judge, it may be appropriate in some instances. This may happen because of the nature of the claims (i.e., those involving personal liability and not subject to absolute immunity) or because of the attorney-client relationship necessary to mount a proper defense (i.e., where extensive factual development or discovery is needed). Often this will be apparent when the complaint is filed. In these situations, assignment of an Assistant U.S. Attorney or Department of Justice lawyer from outside the judge's district would reduce the potential for disruption of the judge's docket stemming from multiple disqualifications that might otherwise occur if the assigned attorney had an extensive docket before the judge. Some judges might prefer an out-of-district attorney, notwithstanding the administrative inconvenience of dealing with geographically remote counsel. If the local U.S. Attorney's office is to provide representation, disruptive disqualifications can be minimized through assignment of an attorney who appears only infrequently before the judge.

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