

ISSUES

1. Must a judge recuse himself or herself from hearing the cases in drug court of participants who were admitted based upon charges issued while that judge served as the District Attorney?
2. If so, may the parties waive recusal?

ANSWER

1. Yes.
2. Yes.

FACTS

A former district attorney was elected judge for the same county in which he served as district attorney. In this county, the district attorney bears the responsibility of allowing or denying defendants' admission into the county's Drug Court program. The Drug Court judge has full authority over sanctions imposed while the case is pending in Drug court. The judge also determines whether to transfer a defendant to another branch for sentencing if the defendant fails to meet the conditions of the Drug Court program.

DISCUSSION

Question 1. Must a judge recuse himself or herself from hearing the cases in drug court of participants who were admitted based upon charges issued while that judge served as the District Attorney?

The Code of Judicial Conduct, SCR 60.04(4)(c) controls.

SCR 60.04. A judge shall perform the duties of judicial office impartially and diligently.

(4) Except as provided in sub. (6) for waiver, a judge shall recuse himself or herself in a proceeding when the facts and circumstances the judge knows or reasonably should know establish one of the following or when reasonable, well-informed persons knowledgeable about judicial ethics standards and the justice system and aware of the facts and circumstances the judge knows or reasonably should know would reasonably question the judge's ability to be impartial:

(c) The judge served as a lawyer in the matter in controversy....¹
He served in his capacity “as a lawyer in the matter in controversy” in those cases initiated when he was district attorney. As district attorney, the judge had sole veto authority to determine a defendant’s involvement in the Drug Court program. As judge in the Drug Court, he would have discretion to make determinations in cases involving those same defendants. The Drug Court judge may impose sanctions during the time the case is pending. He may also terminate the defendant’s participation in the drug court program which would mean transferring the case to another branch for sentencing on the underlying charge(s). The effect of this would be that the same individual allowed the defendant to participate in one capacity, as district attorney and then could decide to sanction or terminate the same defendant’s participation in another capacity, as judge. This would violate the impartiality rule.
Question 2. May the parties waive the recusal?
The Code of Judicial Conduct, SCR 60.04(6) and 60.03 control.

SCR 60.04 A judge shall perform the duties of judicial office impartially and diligently.

(6) A judge required to recuse himself or herself under sub. (4) may disclose on the record the basis of the judge’s recusal and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive recusal. If, following disclosure of any basis for recusal other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be required to recuse himself or herself and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.²

As long as the judge carefully follows the procedure set forth in SCR 60.04(6), the parties may waive recusal. The nature of the drug court, where many defendants may be unrepresented by counsel, may make this process more difficult. It does not, however, prevent the judge from making the decision to participate if he or she determines the waiver was knowingly and freely agreed to, and after considering the admonition found in SCR 60.03.

¹ See also Wis. Stats. 757.19(2)(c). **757.19. Disqualification of Judge (2)** Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs: (c) When a judge previously acted as counsel to any party in the same action or proceeding.

² See also Wis. Stats. 757.19(3). **757.19. Disqualification of Judge (3)** Any disqualification that may occur under sub. (2) may be waived by agreement of all parties and the judge after full and complete disclosure on the record of the factors creating such disqualification.

SCR 60.03. A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

- (1) A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.³

Allowing the judge to make decisions in drug court about a defendant he made decisions about during his time as district attorney may not promote public confidence in the integrity and impartiality of the judiciary. There is at least the potential for appearance of impropriety and partiality in this instance. The judge should consider this in determining whether to recuse himself or herself.

APPLICABILITY

This opinion is advisory only. It is based on the specific facts and questions submitted by the petitioner to the Judicial Conduct Advisory Committee and is limited to questions arising under the Supreme Court Rules, Chapter 60, Code of Judicial Conduct. This opinion is not binding on the Wisconsin Judicial Commission or the Supreme Court in the exercise of their judicial disciplinary responsibilities. This opinion does not purport to address provisions of the Code of Ethics for Public Officials and Employees, Subchapter III of Ch. 19 of the statutes.

I hereby certify that this is Formal Opinion No. 09-3 issued by the Judicial Conduct Advisory Committee for the State of Wisconsin this 6th day of August, 2009.

/s/

Honorable Bruce Goodnough
Secretary

³ See also Wis. Stats. 757.19(2)(g): **757.19. Disqualification of Judge (2)** Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs: (g) When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.