Alaska Court of Appeals

STANDING ORDER NO. 14

Interpreting AS 22.20.020(a)(8)

In March 2017, Judge Tracey Wollenberg took office as a member of this Court. Prior to her appointment, Judge Wollenberg served as the supervising attorney of the appeals section of the Alaska Public Defender Agency.

Because of Judge Wollenberg's former employment with the Public Defender Agency, a question has arisen regarding the meaning of AS 22.20.020(a)(8) as it relates to a judge who previously served as a government attorney. This Court now issues this administrative order to clarify our interpretation of AS 22.20.020(a)(8) as it relates to Judge Wollenberg and to other judges who previously served as attorneys at a government agency.

Alaska Statute 22.20.020(a) sets forth nine grounds for judicial disqualification. The primary rule of disqualification is found in subsection (a)(9): a judge shall not participate in a matter if, for any reason, the judge believes that he or she cannot render a fair and impartial decision.

The other eight grounds for disqualification — subsections (a)(1) through (a)(8) — are based on objective factors, and they apply even when the judge believes that he or she *can* render a fair and impartial decision in the matter. Subsections (a)(1) through (a)(4) involve a judge's personal relationship to the case or to the attorneys litigating the case. Subsections (a)(5) and (a)(6) involve a judge's prior work as a lawyer, either for or against one of the parties. Subsection (a)(7) deals with situations where one of the attorneys in the case has either represented the judge or has represented a person litigating against the judge.

Finally, under subsection (a)(8) of the statute, a judge is precluded from acting in any legal matter if

> the law firm with which the [judge] was associated in the practice of law within the two years preceding the filing of the action [was] retained [by] or ... professionally counseled either party with respect to the matter[.]

The disqualification defined in subsection (a)(8) is notable in two regards.

First, the disqualification does not hinge on whether the judge had any personal involvement in the matter. Rather, the disqualification arises from the fact that someone else in the judge's former law firm was retained by, or professionally counseled, a party to the matter.

Second, the two-year period described in subsection (a)(8) is not counted from the time the judge left the law firm, or from the time the judge began serving as a judicial officer. Rather, the two years is counted backwards from the time the legal action was filed.

This means that the judge will be disqualified from legal matters that are filed up to two years after the judge took office — including matters that wholly arose *after* the judge began serving as a judge. For instance, if a tort or a crime is committed one year after the judge assumes office, and an action is immediately filed, and if one of the parties retains (or is otherwise counseled by) the judge's former law firm, the judge will be disqualified under subsection (a)(8) — because the judge was associated with that law firm "within the two years preceding the filing of the action".

Thus, AS 22.20.020(a)(8) calls for a judge's disqualification in a substantial number of legal matters that did not even exist when the judge was working as a lawyer, based simply on the fact that the judge's former law firm is involved in the litigation.

Because of this, it appears that the statutory disqualification defined in subsection (a)(8) is premised solely on the assumption that the judge has remaining ties to their former law firm, and that these ties will bias the judge.

The legislative history of AS 22.20.020(a) does not expressly clarify this matter. The legislature did not directly explain the rationale or the intended scope of disqualification under subsection (a)(8). Nor did the legislature directly explain what it meant by the phrase, "the law firm with which the [judge] was associated in the practice of law".

But when subsection (a)(8) and other proposed amendments to AS 22.20.-020(a) came up for discussion in the spring of 1987, the bill's sponsor, Representative Max Gruenberg, told his colleagues that the proposal was developed in conjunction with the Alaska Court System, and that the new provisions were intended to modernize and update Alaska's judicial disqualification statute to bring it "into conform[ity] with the canons of judicial ethics." [1]

Because subsection (a)(8) was intended to reflect the then-existing canons of judicial ethics, we conclude that the phrase "law firm with which the [judge] was formerly associated" must be given a restricted interpretation that excludes government agencies.

Our primary reason for reaching this conclusion is that, when the Alaska Legislature enacted subsection (a)(8) in 1987, the American Bar Association's Code of Judicial Conduct contained an analogous provision that called for disqualification based on a judge's previous association with a law firm — and the ABA expressly declared that

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[1] Audio of Senate Finance Committee for May 11, 1987, hearing on House Bill 139, Statement of Rep. Max Gruenberg, @ 1:16:53 - 1:17:20.

this provision did not apply to judges who previously worked as lawyers in government agencies.

The provision at issue — Canon 3(C)(1)(b) of the ABA's Code of Judicial Conduct (1986) — required a judge's disqualification if, while the judge was working as a lawyer, any other lawyer in the judge's former law firm "served during [their] association as a lawyer concerning the matter". [2] But in the Commentary to this canon, the ABA clarified that this blanket rule of disqualification did not apply to judges who formerly worked as lawyers in government agencies — because, in contrast to lawyers working together in a private law firm, a lawyer in a government agency does not normally have the same type of disqualifying "association" with other lawyers working in their agency.

The Colorado Court of Appeals drew a related distinction between government lawyers and private lawyers in *Smith v. Beckman*, 683 P.2d 1214 (Colo. App. 1984):

> A partner in a law firm is said to be "engaged" in every case in which a member of his firm represents a party, primarily because he has a financial interest in the outcome of the case. [But] this rationale does not apply to a lawyer in government service, regardless of his powers and duties, because [a government lawyer's] compensation and clientele are set, and the prestige of the office as a whole is not greatly affected by the outcome of a particular case. [Thus], a government attorney is only "engaged in the case" when he has worked on it directly.

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[2] American Bar Association, *Code of Judicial Conduct* (1983 & 1986), Canon 3(C)(1)(b).

Id. at 1216. This view is shared by other jurisdictions. [3]

Our narrowing interpretation of "law firm" is also supported by another facet of the legislative history of AS 22.20.020: the Alaska Court System's participation in the drafting of the statute, and its approval of the language of subsection (a)(8).

The bill containing subsection (a)(8) was introduced by Representative Max Gruenberg. At a hearing in front of the Senate Finance Committee, Representative Gruenberg explained that his bill was developed in conjunction with the Alaska Court System. [4] And at a hearing in front of the House Judiciary Committee, Representative

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[3] *See*, *e.g.*, *People v. Julien*, 47 P.3d 1194, 1197-98 (Colo. 2002) (noting and following the majority rule that a judge is not disqualified solely on the basis of their former employment in the prosecutor's office, absent their performance of some role in the case or their knowledge of disputed evidentiary facts); *State v. Connolly*, 930 So.2d 951, 954-55 (La. 2006) (holding that trial judge is not disqualified solely on basis of their prior employment in the prosecutor's office at the time that the charges were filed against the defendant, absent personal participation in the case); *see also* Illinois Code of Judicial Conduct, Rule 63 (Canon 3(C)(1)(c)) (declaring that a judge is disqualified from a case where "the judge was, within the preceding three years, associated in the *private practice* of law with any law firm or lawyer currently representing any party in the controversy" (emphasis added), but adding that "[the] referral of cases when no monetary interest was retained shall not be deemed an association within the meaning of this subparagraph"); Florida Judicial Ethics Advisory Committee Opinion No. 2010-36 (Oct. 28, 2010) (concluding that, under the Florida Code of Judicial Conduct, "service in the office of a public defender or other public agency does not automatically disqualify a judge from adjudicating matters which were assigned to the agency at the time the lawyer, who is now a judge, was employed by that agency").

[4] Audio of Senate Finance Committee for May 11, 1987, hearing on House Bill 139, statement of Rep. Max Gruenberg, @ 1:16:53 - 1:17:20.

Gruenberg told the committee that the Alaska Supreme Court had discussed his bill, and that the court did not have any concerns about it. [5]

The House Judiciary Committee's file also contains a letter written to Representative Gruenberg by Karla Forsythe, General Counsel to the Alaska Court System. In her letter, Ms. Forsythe confirmed that the Court System did not foresee any "administrative, procedural, or fiscal difficulties" arising from the bill.

But if subsection (a)(8)'s reference to "law firm" were interpreted to include government agencies such as the Public Defender Agency and the Criminal Division of the Department of Law, this would mean that trial court judges who formerly worked as state prosecutors or as assistant public defenders would be disqualified from participating in a substantial number of criminal cases — and this disqualification would persist for several years after their appointment to the bench.

Given the number of prosecutors and defense attorneys who are appointed to positions on the trial bench in Alaska, it is inconceivable that the Alaska Supreme Court and the Court System's General Counsel would have told Representative Gruenberg that they had no concerns about his bill, and that they did not foresee any "administrative, procedural, or fiscal difficulties" arising from the bill, if there had been any suggestion that subsection (a)(8) applied to judges who formerly worked as government attorneys.

Instead, it appears that the Alaska Supreme Court and the court system administration believed that subsection (a)(8) would be interpreted in a manner consistent with the supreme court's earlier decision in *Keel v. State*, 552 P.2d 155 (Alaska 1976).

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[5] Audio of House Judiciary Committee for April 10, 1986, statement of Rep. Max Gruenberg regarding the predecessor legislation, House Bill 516, @ 03:30 - 03:50.

Keel involved a criminal prosecution brought by the State of Alaska. [6] The judge assigned to Keel's case had been appointed a few months before Keel's case was filed, and the judge had worked as an assistant district attorney before his appointment. [7] At the time, subsection (a)(5) of AS 22.20.020 precluded a judge from participating in a case if the judge had "professionally counseled" either of the parties within two years preceding the filing of the action. [8]

Keel argued that, because the judge assigned to his case had formerly been employed as a state prosecutor, the judge had (by definition) "professionally counseled" one of the parties (*i.e.*, the State) within the two-year period specified in the statute — and, thus, the judge was disqualified under subsection (a)(5). [9] But the Alaska Supreme Court held that, for purposes of subsection (a)(5), assistant district attorneys do not "counsel" the State. [10]

In *Keel*, the supreme court interpreted subsection (a)(5) as addressing the concern that the "personal loyalties fostered during professional counseling might generate conscious or unconscious partiality, or at least its appearance." [11] The court then held that a judge's former employment as a government attorney did not raise this concern:

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[6] *Keel*, 552 P.2d at 156.

[7] *Id.* at 155-56.

[8] *Id.* at 156.

[9] *Ibid.*

[10] *Id.* at 157.

[11] *Id.* at 156.

> In the circumstances of a superior court judge [formerly] employed as an Assistant District Attorney, the risk of personal loyalties to former clients, engendered by virtue of the special pecuniary nature of the attorney-client relationship, is greatly diminished. It is unrealistic to assume that representation of such an "artificial and generalized party" as "the State" might foster those kinds of [disqualifying] personal bonds that could develop between private counsel and the individuals or groups he had occasion to serve.

Keel, 552 P.2d at 157. The supreme court then added that it considered assistant public defenders to fall within this same category of government servants:

> Were there any appreciable risk of partiality or the appearance thereof [arising from a judge's former role as a prosecutor], it would be equally necessary to disqualify judges who had formerly served at public expense in a defense capacity with the office of the Public Defender. Since there is no suggestion that the terms of AS 22.20.020(a)(5) operate to disqualify former Public Defenders, the legislature apparently shares our view in this matter.

Id. at 157.

In sum, both the law of Alaska preceding the enactment of AS 22.20.020(a)(8) and the contemporaneous legislative history of that statute point to the conclusion that the phrase "law firm" in AS 22.20.020(a)(8) does not include government agencies. This Court therefore adopts that interpretation of subsection (a)(8).

Because AS 22.20.020(a)(8) does not apply to judges who worked for government agencies before their appointment to the bench, Judge Wollenberg will not disqualify herself from a case simply because the case was handled by lawyers in the Public Defender Agency during the two years before the appeal was filed.

However, Judge Wollenberg will continue to disqualify herself when disqualification is required under any of the other subsections of AS 22.20.020(a). And more specifically, Judge Wollenberg will disqualify herself in any case in which (1) she appeared personally as the attorney of record, or in which (2) she directly supervised the handling of the appeal, or in any other case in which (3) she engaged in substantive discussions with any Agency attorney regarding the case.

Adopted: January 16, 2018
Effective: March 28, 2017 (*nunc pro tunc*)

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Chief Judge David Mannheimer

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Judge Marjorie K. Allard

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Judge Tracey Wollenberg