

CLE Presentation
2022 CLE & Training Program
Hosted by US Court of Appeals for the Armed Forces

Title: Judicial Disqualification

Duration: 60 minutes

Course Objectives: This ethics class is focused on the judicial canons and ethics rules that require judges to recuse from a particular case. The 2021 Year End Report of the Federal Judiciary included two topics that have garnered the attention of Congress and the free press: the matter of financial disclosures and recusal obligations and “the continuing concern over inappropriate behavior in the judicial workplace.” For both of these concerns the importance of ethics training was emphasized. This briefing hopes to add to that educational component.

Sources:

The Code of Judicial Conduct may have slight variations between the different jurisdictions. Each service has its own judicial code of conduct but all are very similar to the federal iteration.

The Federal Judge Code of Conduct, 12 March 2019¹ has 5 canons:

Canon 1: A Judge Should Uphold the Integrity and Independence of the Judiciary

Canon 2: A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities

Canon 3: A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently

Canon 4: A Judge May Engage in Extrajudicial Activities That are Consistent With the Obligations of Judicial Office

Canon 5: A Judge Should Refrain From Political Activity

“Any justice, judge or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” 28 USC 455(a). The statute continues with a list of per se disqualifying conditions. 28 USC 455(b). The military has incorporated similar requirements for recusal in Rule for Courts-Martial (R.C.M.) 902, Disqualification of military judge.

RCM 902(b)(5)(B) requires a military judge to recuse when they, their spouse, or a relative within the third-degree of relationship has an “interest, financial or otherwise, that could be substantially affected by the proceeding.” Due to the nature of our legal practice and that courts-martial seldom stray into issues that would impact a private company’s share price, it is less likely that for a military judge will need to confront the fiduciary conflict exception.

¹ <https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges>

However, it may be more likely during times when a military judge is approaching retirement and looking for outside employment. The DC Circuit Court of Appeals held that under the similarly worded Rule for Military Commissions 902, a military judge's job application to the US Department of Justice created a disqualifying appearance of a lack of impartiality. In *re Al-Nashiri*, 921 F.3d 224 (DC Cir 2019) the court stated "judges may not adjudicate cases involving their prospective employers." *Id* at 235. DOJ attorneys were representing the government in the military commission case before the judge. During the course of the lengthy court-proceedings, the military commissions' judge had applied for a post-military retirement job as an immigration judge. The court acknowledged that "the Justice Department is a complex institution with many offices performing many different functions" however, the Attorney General was "directly involved in selecting and supervision immigration judges." *Id*. Likewise the court examined the involvement of both the Department of Defense and the DOJ in the litigation. Even though the DOD was the lead agency for the government, the DOJ had detailed one of its lawyers and the office of the Attorney General was involved the military commissions both in establishing the rules and in determining which appeals went to federal court. *Id*. For all these reasons, the DC Circuit Court of Appeals determined that recusal was required.

Of course, like all good attorneys we can look at these facts and try to parse them. What if a military judge is presiding over a standard court-martial with only DOD attorneys while applying for a job with the DOJ?² What if the judge is applying for a job in another part of the Department of Defense while presiding over courts-martials? What if the judge disclosed a potential disqualification?³

Along with disqualifying financial entanglements, we will examine cases where a judge's personal involvement with a party or witness led to disqualification concerns. When does a military judge's interaction with counsel rise to the level requiring recusal?⁴ Do frequent routine professional interactions require recusal?⁵ What if a witness is friends with a relative of the military judge? What if a military judge has children close in age to the victim and are in some of the same social organizations?⁶

This lecture will examine these issues and look at cases in the military, state and federal where judicial disqualification has been raised in circumstances that provide some guidance for situations that may occur in courts-martials.

² *US v. Wilson*, 2021 CCA Lexis 284 (AFCCA June 10, 2021)(unpub); *US v Snyder* 2020 CCA Lexis 117 (AFCCA April 15 2020)(unpub)

³ *Judge in mask case is married to a teacher*, Meagan Flynn, Washington Post , page B4, 7 February 2022

⁴ *US v. Uribe*, 80 MJ 442 (CAAF 2021)

⁵ *US v. Sullivan* 74 MJ 448 (CAAF 2015); *US v. Cron*, 73 MJ 718 (AFCCA 2014)

⁶ *US v Medina*, 2021 CCA Lexis 158 (ACCA March 29, 2021)