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DIRECTIVE #31-17
[Supersedes Directive Issued 9/19/1983]

To: Assignment Judges
From: Glenn A. Grant, J.A.D. 
Re: Disqualification of Judges -- Former Prosecutors/Public Defenders
Date: November 14, 2017

This Directive supersedes the Directive (unnumbered) previously issued on September 19, 1983 by then Acting Administrative Director Robert D. Lipscher regarding the disqualification of judges in criminal matters. The updates to the Directive are: (1) to reinforce to judges those circumstances where judicial disqualification is required without exception, and (2) to amend/revise language to be consistent with the recent revisions made to the Code of Judicial Conduct.

The Supreme Court has established the following constraints concerning judicial disqualification in criminal cases, where the judge previously served as prosecutor, as public defender, or as an assistant in one of those offices:

1. Except when required by the rule of necessity, a judge shall disqualify himself or herself in a criminal matter that was pending in his or her office when he or she was the prosecutor or the public defender, whether or not he or she actively participated in the investigation, prosecution, or defense of the case, or had actual knowledge of it. Judicial disqualification in this circumstance is not subject to waiver by the parties. See the Code of Judicial Conduct, Canon 3, Rule 3.17(C).

As the prior head of either office, the judge would have had the overall responsibility for the conduct of the case. As such, judicial disqualification is necessary to preserve the appearance of impartiality and the overall integrity of the judicial process.

2. A judge shall disqualify himself or herself from hearing a criminal matter involving a defendant who the judge, in his or her previous capacity as a municipal or county prosecutor or as a municipal or regional public defender, had personally prosecuted or defended, or represented in a civil

matter in the past. Judicial disqualification in this circumstance is not subject to waiver by the parties. See the Code of Judicial Conduct, Canon 3, Rule 3.17(C).

Given the liberty interests at stake in a criminal prosecution, permanent judicial disqualification in these circumstances is necessary to ensure impartiality and its appearance, to avoid impropriety or its appearance, and to preserve the overall integrity of the judicial process.

3. A judge shall disqualify himself or herself from hearing a civil matter involving a litigant whom the judge, in his or her previous capacity as a municipal or county prosecutor or as a municipal or regional public defender, had personally prosecuted or defended, for a minimum of seven years following the conclusion of that criminal matter. Judicial disqualification for a period of time greater than seven years may be required in certain circumstances. See Code of Judicial Conduct, Canon 3, Rule 3.17 (B)(4)(b) (requiring disqualification for a minimum of seven years following the conclusion of a judge's representation of a former private client for whose matter the judge had primary responsibility whenever that former private client is a party in a matter before the judge).

In determining whether disqualification for a period of time greater than seven years from the conclusion of a prior criminal matter is necessary in this context, judges should be guided by DeNike v. Cupo, 196 N.J. 502.

4. A judge need not disqualify himself or herself from hearing a criminal matter that was pending at the time when the judge served as an assistant county prosecutor or assistant county public defender, if the judge had no direct or indirect involvement with the matter.

Since as an assistant in either office, the judge would not have been charged with overall responsibility for the conduct of the case, disqualification is unnecessary absent direct or indirect involvement in the investigation, review or trial.

EDITOR'S NOTE

*2017 Update – The language throughout this superseding Directive has been amended/revised to be consistent with the recently revised Code of Judicial Conduct. Code of Judicial Conduct, Canon 3, Rule 3.17, Disqualification

The text has been amended to render it gender-neutral.

cc: Chief Justice Stuart Rabner
Hon. Carmen Messano, Presiding Judge, Appellate Division
Hon. Jack M. Sabatino, Deputy Presiding Judge, Appellate Division
Hon. Patrick DeAlmeida, Presiding Judge, Tax Court
Steven D. Bonville, Chief of Staff
AOC Directors and Assistant Directors
Clerks of Court
Trial Court Administrators
Ann Marie Fleury, Special Assistant
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Robert Arter, Counsel, ACEA