MINNESOTA BOARD ON JUDICIAL STANDARDS

Advisory Opinion 2013–2

Judicial Disqualification – Judge's Professional Relationship with Lawyer

Issue. Under what circumstances is disqualification required when a judge has or has had a professional but non-financial relationship with a lawyer or law firm appearing before the judge on a currently pending matter?[1]

Summary. Rule 2.11 places concerns about a judge's impartiality into three categories. First, under Rule 2.11(A)(1), a judge is disqualified if the judge has a personal bias or prejudice concerning a party or lawyer or has personal knowledge of disputed facts. Second, under Rule 2.11(A) and (C), a judge is disqualified if the judge's impartiality may reasonably be questioned; but if the judge is in fact impartial, the judge may ask the parties and their lawyers to waive the disqualification. Third, even when the judge does not believe there is a basis for disqualification, the judge "should disclose . . . information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification." Rule 2.11, cmt. 5.

The rule explicitly requires disqualification if "[t]he judge served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association." Rule 2.11(A)(5)(a). This opinion addresses seven additional factual situations that commonly raise questions about disqualification:

(1) *Judge was formerly associated in a law firm with a lawyer who is now appearing before the judge, either as a party or party's attorney.* In general, disqualification is not required simply because a judge was once professionally associated with a lawyer for one of the parties in a case.

(2) *Judge was a former government attorney and was associated with current government attorney who is now appearing before the judge.* If the judge when employed by the governmental agency participated personally and substantially in a matter that is now assigned to the judge, the judge should recuse. If the judge did not personally participate in the matter, the judge is not automatically disqualified.

(3) *Judge's former law clerk appears in a pending case.* Generally, disqualification is not required when a judge's former law clerk appears on a pending matter.

(4) *Judge's former partner or associate was involved in a related matter when judge was a member of the firm.* If the matter currently pending before the judge is not the same matter in which the judge's former partner or associate was involved, the judge is generally not required to

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[1] This opinion is a companion to Board Advisory Opinions 2014-1, "Under what circumstances is disqualification required when a judge has or has had a financial relationship with a lawyer, law firm, or prosecuting authority that is now appearing, or will appear, before the judge on a pending or impending matter?" and 2025-1, "Judicial Disqualification Issues Arising from Party's or Attorney's Actions."

recuse. However, the judge should disclose the prior professional relationship at the earliest practicable time.

(5) *Law firm for party represents judge on unrelated matter.* In determining whether disqualification is required when a law firm for a party is representing a judge on an unrelated matter, the judge may consider the following four factors: (1) "the extent of the attorney-client relationship"; (2) "the nature of the representation"; (3) the frequency, volume, and nature of the judge-lawyer contacts; and (4) "any special circumstances." *Powell v. Anderson*, 660 N.W.2d 107, 118 (Minn. 2003).

(6) *Lawyer represents judge in unrelated matter as a technical party.* Disqualification is not mandatory simply because a judge who has been named as a technical party in a case is represented on that matter by a lawyer who is also appearing before the judge in a currently pending case. However, the judge should disclose the relationship at the earliest practicable time.

(7) *Judge is under contract as expert witness on unrelated matter for a party in a matter pending before the judge.* A judge in this situation must recuse unless disclosure is made, and consents are obtained, pursuant to Rule 2.11(C).

Authorities. The principal authorities for this opinion are Rule 2.11(A)(5)(a) and (b) and comments 1 through 5 to that Rule. Unless otherwise noted, all references to Rules and Comments are to those in the Minnesota Code of Judicial Conduct (2025) ("Code").

Other authorities include Rule 1.2 and comment 3; Canon 2, Rule 2.2, and comment 1; cases decided by the Minnesota Supreme Court and Minnesota Court of Appeals; and Arthur Garwin et al., *Annotated Model Code of Judicial Conduct* (3d ed. 2016) ("*Annotated Model Code*").

The Comments serve two functions: (1) they "provide guidance regarding the purpose, meaning, and proper application of the rules," and (2) they "identify aspirational goals for judges." Code, Scope.

Where the Rules or Comments use a permissive term such as "may" or "should," the intent is not to create a mandate for action. Rather, the conduct being addressed or action being considered "is committed to the personal and professional discretion of the judge." *In re Jacobs*, 802 N.W.2d 748, 754 (Minn. 2011).

Nonetheless, Board advisory opinions will often advise judges of what they *should* do, as well as what they *must* do.

Authority to Issue Advisory Opinions. "The board may issue advisory opinions on proper judicial conduct with respect to the provisions of the Code of Judicial Conduct. . . . The advisory opinion shall not be binding on the hearing panel or the Supreme Court in the exercise of their judicial-discipline responsibilities." Rules of the Board on Judicial Standards, Rule 2(a)(2) (2025).

ADVISORY OPINION

Code Provisions. The Code contains several principles that are directly relevant to the issue addressed in this opinon. First, the basic rule is that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." Rule 2.11(A).

Second, the basic rule requiring disqualification applies if "[t]he judge served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association." Rule 2.11(A)(5)(a).

Third, the rule for judges whose experience as a lawyer includes prior governmental service is virtually identical, with an additional provision requiring disqualification if the judge, while in government service as a lawyer, "publicly expressed . . . an opinion concerning the merits of the particular matter in controversy." Rule 2.11(A)(5)(b).

Fourth, "[a] judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed." Rule 2.11 cmt. 2.

Fifth, "[a] judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification." Rule 2.11 cmt. 5.

Finally, an objective "reasonable examiner" standard applies. The test is whether "an objective, unbiased layperson with full knowledge of the facts and circumstances" would reasonably question the judge's impartiality. *State v. Pratt*, 813 N.W.2d 868, 876 n.8 (Minn. 2012) (quoting *In re Jacobs*, 802 N.W.2d 748, 753 (Minn. 2011)).

Prior Code and Comments. Canon 3D(1)(b) of the pre-2009 Code contained language similar to that now found in Rule 2.11(A)(5). However, two changes in the Code and Comments are noteworthy.

First, the 2009 Code provides, "A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law." Rule 2.7. The prior Code included a similar provision. *See* Canon 3(A)(1) (1996). However, the 2009 Code also includes a comment that has no counterpart in the prior Code.

> Although there are times when disqualification is necessary to protect the rights of litigants and preserve public confidence in the independence, integrity, and impartiality of the judiciary, judges must be available to decide matters that come before the courts. Unwarranted disqualification may bring public disfavor to the court and to the judge personally. The dignity of the court, the judge's respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues requires that a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular issues.

Rule 2.7, comment 1.

Rule 2.7 does not create a presumption against recusal. "The purpose of this Rule 2.7 and the accompanying Comment is not to resurrect a 'duty to sit' that trumps disqualification rules, but simply to emphasize that judges have a duty to do their jobs when they are not properly disqualified." Charles G. Geyh & W. William Hodes, *Reporters' Notes to the Model Code of Judicial Conduct* 35 (ABA 2009). Many courts and commentators believe that close questions should be resolved in favor of recusal. *See, e.g.*, Leslie W. Abramson, *What Every Judge Should Know about the Appearance of Impartiality*, 79 Alb. L. Rev. 1579, 1587 (2016) ("[T]he better view is that for public confidence in the judicial system, the 'appearance of partiality' is more important than the judge's duty to sit and decide a specific case.")

Second, the comment to prior Canon 3D(1)(a) stated that a judge is required to disclose "personal relationships of a judge with lawyers appearing in any matter, such as a former partner, close personal friend, or other relationship which may give the appearance of impropriety, conflict of interest, or favoritism." Current Rule 2.11(A) and its comments do not directly carry forward this prior comment. Comment 5 to Rule 2.11 now provides: "A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification." Thus, disclosures of personal relationships with lawyers which were *required* under the prior Code are now *advisable* under the 2009 Code.

DISCUSSION

1. *Judge was formerly associated in a law firm with a lawyer who is now appearing before the judge, either as a party or representing a party.*

Generally speaking, "the [mere] fact that a judge was once professionally associated with a lawyer for one of the parties in a case is not, without more, grounds for disqualification." *Annotated Model Code* at 257. However, in some circumstances, the judge's former association with a lawyer appearing before the judge could disqualify the judge, e.g., because of an unusually close personal relationship, or a financial relationship. *See* Rule 2.11(A)(1).

When disqualification issues arise based on a judge's former association with a lawyer, some jurisdictions employ a "totality of the circumstances" test to determine whether a reasonable person would question a judge's impartiality. *Annotated Model Code* at 258. The factors considered in these jurisdictions are:

> (1) the nature and extent of the prior association, (2) the length of time since the association was terminated, (3) the possibility that the judge might continue to benefit from the relationship, and (4) the existence of continuing personal or social relationships springing from the professional relationship.

Id. These factors are consistent with the factors set forth in *Powell v. Anderson*, 660 N.W.2d 107, 118 (Minn. 2003). See discussion of Situation 5 below.

Finally, a judge must disqualify if the judge "was associated with a lawyer who participated substantially as a lawyer in the matter during such association" regardless of whether the lawyer is now appearing before the judge. Rule 2.11(A)(5)(a). See situation 4 below.

2. *Judge was a former government attorney and was associated with current government attorney who is now appearing before the judge.*

The subject of disqualification of judges who formerly served in government employment (e.g., as a prosecutor or public defender) is specifically addressed in Rule 2.11(A)(5)(b), which does not provide for automatic disqualification. Clearly, if the judge when employed by the governmental agency participated personally and substantially in a matter that is now assigned to the judge, the judge must recuse pursuant to Rule 2.11(A)(5)(b). *Annotated Model Code* at 330-31. If the judge did not personally participate in the matter, the judge is not automatically disqualified, but the judge should consider the "totality of the circumstances" test (stated in situation 1, above), especially where the judge formerly supervised or had a close working relationship with the government attorney now appearing before the judge.

A judge should not adopt a general policy of recusing whenever a former colleague appears before the judge due to the burden that places on the judge's colleagues. *See* Rule 2.7 (stating "A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law.").

3. *Judge's former law clerk appears in a pending case.*

The general rule is that disqualification is not necessarily required when a judge's former law clerk appears on a pending matter. *Smith v. Pepsico, Inc*., 434 F. Supp. 524, 526 (S.D. Fla. 1977); *Annotated Model Code* at 259-61. Note that in *Pepsico* a period of more than two years had gone by since the former law clerk had been employed by the court. *Pepsico*, 434 F. Supp. at 525. Several other jurisdictions, including the U.S. Bankruptcy Court in Minnesota (*see* Local Rule 9010-1(c)), have either formally or informally adopted a policy to observe an hiatus, such as one year, before law clerks may appear before the judge under whom they served. *Annotated Model Code* at 259-61. Some jurisdictions also prohibit former clerks from appearing in any cases that were pending before the court during their tenure. *Fredonia Broad. Corp. v. RCA Corp.*, 569 F.2d 251, 255 & n.5 (5th Cir. 1978).

Disqualification of the judge or former law clerk may be required if the former law clerk worked on the pending matter while serving as the judge's clerk. *See Fredonia Broad. Corp. v. RCA Corp.*, 569 F.2d 251, 257 (5th Cir. 1978) (remanding matter for retrial before a different judge where the trial judge allowed a former law clerk who had worked on the case to appear as counsel for a party).

A lawyer's appearance in a matter in which the lawyer had participated "personally and substantially" as a law clerk may violate lawyer ethics rules. Rule 1.12(a), Minnesota Rules of Professional Conduct (MRPC), provides that "a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person . . . unless all parties to the proceeding give

informed consent, confirmed in writing." If a lawyer's appearance would violate Rule 1.12(a), it may be appropriate to disqualify the lawyer. "Judges have broad discretion, as part of their supervisory powers, to control and maintain their courtrooms and to determine which lawyers are allowed to appear before them." *Archuleta v. Turley*, 904 F.Supp.2d 1185, 1191 (D. Utah 201I). In that situation, disqualification of the former clerk's firm may not be necessary if the former clerk is screened off and the firm has otherwise complied with MRPC 1.12(c),

Disqualification of neither the judge nor the lawyer may be required if the lawyer's contact with the case as a law clerk did not amount to personal and substantial participation, such as "remote or incidental administrative responsibility that did not affect the merits." MRPC 1.12 cmt. 1.

4 *Judge's former partner or associate was involved in a tangentially related matter when judge was a member of the firm.*

Rule 2.11(A)(5)(a) requires disqualification when the judge "was associated with a lawyer who participated substantially as a lawyer in the matter during such association." A former partner's or associate's participation in a tangentially related matter would not necessarily require disqualification. *See, e.g.*, *Town of Denmark v. Suburban Towing, Inc*., No. 82-C5-98-006049, 2010 WL 1190756, *3 (Minn. Ct. App. Mar. 30, 2010) (holding that disqualification was not required where the controversy at hand did not involve the same conditional use permit that the judge's former partner had drafted and the party seeking disqualification had failed to question the judge's prior relationship when the judge first disclosed it). If the earlier matter and the current matter are connected, the judge should disclose the information at the earliest practicable time. *See* Rule 2.11 cmt. 5.

5. *Law firm for party represents judge on unrelated matter.*

Powell v. Anderson, 660 N.W.2d 107 (Minn. 2003), involved multi-party business litigation where most of the issues on appeal were resolved in the defendants' favor in a unanimous 2000 Court of Appeals opinion authored by Judge Roland Amundson. *Id.* at 112. Three of the defendants in *Powell* were represented by attorneys from a a Minneapolis law firm. *Id.* at 111. While the *Powell* case was pending in the Court of Appeals, Amundson was represented by another attorney from the same firm in connection with claims about his alleged misappropriation of funds from a trust in which he served as trustee. *Id.* at 113.

In deciding whether to set aside the 2000 Court of Appeals decision on the ground that Judge Amundson should have disqualified himself, the Supreme Court adopted a four factor test: (1) "the extent of the attorney-client relationship"; (2) "the nature of the representation"; (3) the frequency, volume, and nature of the judge-lawyer contacts; and (4) "any special circumstances." *Id.* at 118.

Each of these factors was discussed in the opinion. *Id.* With regard to the first factor, the Court noted:

> If the relationship consisted of a single, short episode, or even a series of sporadic contacts, disqualification is less likely than if it consisted of a long-term, continuous course of representation. Similarly, representation that had been concluded prior to the instant case is less likely to lead to disqualification than representation that is concurrent with the case.

Id. As to the second factor, the Court observed:

> A direct relationship, where the judge is represented personally, is more indicative of a reasonable question regarding the judge's impartiality than a relationship that only involves the judge in some institutional or technical role. Further, the more serious the matter for the judge, the greater the impact of the representation on the judge's impartiality.

Id. (See discussion of Situation 6 below.)On the third factor:

> [T]he reviewing court should consider the frequency, volume and quality of contacts between the judge and the attorney or law firm. The more frequent and substantial these contacts, the more likely the relationship is to create a reasonable question as to impartiality. Likewise, the closer the contacts come to the subject of the case before the judge, the greater the impact on impartiality.

Id. And on the fourth factor, the opinion notes that attention should be paid to "any special circumstances that might either enhance or limit (1) the importance of the attorney or firm to the judge and/or (2) the appearance of impropriety to the public." *Id. See also Annotated Model Code* at 261-67 (identifying and discussing four similar, but not quite identical, factors); Richard E. Flamm, *Recusal and Disqualification of Judges*, 455-59 (3d ed. 2017); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 07-449, *Lawyer Concurrently Representing Judge and Litigant Before the Judge in Unrelated Matters* (2007).

While the Supreme Court's opinion in *Powell* involves an appellate court judge, the *Powell* factors may also apply to disqualification issues confronted by trial court judges.

6. *Lawyer represents judge in unrelated matter as a technical party.*

The second *Powell* factor is "the nature of the representation." One Minnesota case held that a judge was not required to recuse where the attorney appearing before the judge also represented the judge in only a limited capacity. In *Desnick v. Mast*, 249 N.W.2d 878 (Minn. 1976), an attorney who appeared before the judge also represented the judge in a malpractice action. This action was brought against one of the judge's former law partners, and the judge and the other members of the firm were joined as nominal parties, all of whom were represented by the lawyer who was appearing before the judge. The Court rejected a claim that a new trial should be granted. The Court emphasized the judge's nominal status as a party in the malpractice case, the technical, non-personal nature of the contact they had had on the case, and the limited nature

of the relationship between them on the other matter. *Id.* at 882-83. However, it is important to note that in *Powell*, the Court stated: "W*e* do not consider *Desnick* to be controlling precedent on the issue of disqualification. First, *Desnick* did not address the question of disqualification under the Code of Judicial Conduct but rather went directly to the question of whether the plaintiff was denied a fair trial, which is relevant to the issue of vacatur. Second, . . the issue of disqualification is fact-dependent, and *Desnick* is factually distinguishable from the present case." 660 N.W.2d at 118.

One problem in the *Desnick* case was that the judge never informed the other lawyers in the pending matter about the lawyer's representation of the judge in the malpractice lawsuit. 249 N.W.2d at 882-83. Under the current Code, disclosure should be made. Rule 2.11 cmt. 5. The *Desnick* court ordered that further proceedings in the case be assigned to a different judge. 249 N.W.2d at 883 n.2.

If a judge is represented by the attorney general's office in a lawsuit stemming from judicial acts, the judge is not usually disqualified from a case in which another attorney from that office appears. *See Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 247 A.3d 229, 246-48 (Del. 2021)*;* U.S. Jud. Conf. Comm. Code Cond., *Disqualification Issues Relating to Judge Being Sued in Official Capacity, Including Representation by Department of Justice*, Adv. Op. No. 102 (June 2009); *cf.* ABA Informal Ethics Opinion 1477 (1981) (opining that, except in unusual circumstances, "when a *private* lawyer is currently representing a judge, even in a matter involving the judge's official position or conduct, the judge should not sit in a case in which a litigant is represented by the lawyer") (emphasis supplied).

(7) *Judge is under contract as expert witness on unrelated matter for a party in a matter pending before the judge.*

In *State v. Pratt*, 813 N.W.2d 868, 875 (Minn. 2012), the Minnesota Supreme Court granted a new trial because the judge who presided at the defendant's trial in a case prosecuted by the Hennepin County Attorney's Office was under contract as an expert witness for the same office at the same time, albeit on a different, unrelated matter. This case is discussed in Formal Opinion 2014-1.

Revised May 9, 2025