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?

Summary. Rule 2.11 places concerns about a judge's impartiality into three categories. First, Rule 2.11(A) addresses when the judge must recuse due to a reasonable basis for concern about the judge's partiality. Second, under Rule 2.11(C), in situations where the judge's impartiality may reasonably be questioned but 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.

This opinion addresses seven 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 representing a party.* 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 may recuse, but the judge is not required to recuse. However, the judge should disclose the prior professional relationship at the earliest practicable time.

(5) *Lawyer representing judge 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.

(6) *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).

(7) *Judge 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 (2009) ("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* (2d ed. 2011) ("*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) (2009).

ADVISORY OPINION

Code Provisions. The Code contains several principles which 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, "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 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. The essential point to keep in mind here is that the 2009 Code more clearly requires a judge to consider the duty to decide cases when considering whether to recuse in cases where disqualification is not mandatory.

Second, the comment to prior Canon 3D(1)(a) stated 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."

The point to keep in mind here is that certain disclosures which were *required* under the prior Code are now *advisable* under the 2009 Code.

Prior Advisory Opinions. The Code provisions relevant to the issue addressed in this opinion were amended in 2009. Prior to 2009, the Board issued a total of twelve informal advisory opinions on judicial disqualification.[1] Seven of those opinions dealt with the issue of disqualification based on the judge's non-financial relationship with a lawyer.

In light of the 2009 changes in the Code, one of those seven opinions, issued in 1988, has been withdrawn. The 1988 opinion, which addressed the question of whether a judge is required to recuse upon request whenever a lawyer who was in a law firm with the judge appears in front of the judge, is effectively superseded by this opinion.

The Board issued Advisory Opinion 2014-1, available on the Board website, which addresses the issue of disqualification when some sort of a financial relationship exists between the judge and the lawyer or law firm.

Terminology, definitions. The Code defines the term "pending matter" as "a matter that has commenced," and notes that "[a] matter continues to be pending through any appellate process until final disposition." Code, Terminology. Although the term "matter in controversy" as used in Rule 2.11(A)(5) is not defined in the Terminology section of the Code, that term has been construed to refer to the *current* matter in controversy, not a prior dispute on the same general subject. *See Town of Denmark v. Suburban Towing, Inc*., No. A09-947, 2010 WL 1190756, *3 (Minn. Ct. App. Mar. 30, 2010).

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.*

There are three general standards applicable to this factual situation. 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 235. However, a judge must disqualify if the judge, "was associated with a lawyer who participated substantially as a lawyer in the matter during such association." Rule 2.11(A)(5)(a). In addition, in some circumstances the judge's former association with a lawyer could be disqualifying for 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 236. The factors considered in these jurisdictions are:

[1] The Board's website includes the prior Board opinions. *Summary of Advisory Opinions*, Board on Jud. Standards (Dec. 15, 2014), *http://bjs.state.mn.us/file/advisory-opinions/advisory-opinions-index-current.pdf.*

> (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.

The Board believes that these four factors are helpful in resolving disqualification issues when the judge was formerly associated with a lawyer or law firm appearing on a pending matter.

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 should recuse pursuant to Rule 2.11(A)(5)(b). *Annotated Model Code* at 267. 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. *Id.* at 268.[2]

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 237-39. Note that in *Pepsico* a period of more than a year had gone by prior to the former law clerk's participation in the pending matter. *Pepsico*, 434 F. Supp. at 525. Several other jurisdictions, including the U.S. Bankruptcy Court in Minnesota, have either formally or informally adopted a policy to observe a one-year hiatus before law clerks may appear before the judge under whom they served. *Annotated Model Code* at 238.

[2] Rule 2.11(A)(5)(a), which requires disqualification if the judge "was associated with a lawyer who participated substantially as a lawyer in the matter during such association," does not, in the Board's opinion, apply to former government attorneys.

However, disqualification may be required if the former law clerk was in any way involved in the matter that is now pending 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 judge's former law clerk appeared as counsel for party and had worked on judge's staff while matter pending).

4 *Judge's former partner or associate was involved in a 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. *Lawyer representing judge as a technical party.*

In *Desnick v. Mast*, 249 N.W.2d 878, 882-83 (Minn. 1976), the Court rejected a claim that a new trial should be granted because the judge was represented on a malpractice claim by a lawyer who represented a party on a matter currently pending before the judge. 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 n.1.

Desnick effectively stands for this proposition: disqualification is not mandatory when a judge who has been named as a technical party in a case is now being represented on that matter by a lawyer who is also appearing before the judge in a currently pending case. *Annotated Model Code* at 239.

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. *Desnick*, 249 N.W.2d at 882-83. Under the current Code, of course, disclosure should be made. *See* Rule 2.11 cmt. 5.

6. *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 the Rider Bennett law

firm. *Id.* at 111. While the Powell case was pending in the Court of Appeals, Amundson was represented by another Rider Bennett attorney in connection with claims about his alleged misappropriation of funds from a trust where he served as trustee. *Id.* at 113.

In deciding whether to set aside the 2000 Court of Appeals decision on the grounds 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.

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 236 (identifying and discussing four similar, but not quite identical, factors).

While the Supreme Court's opinion in *Powell* technically only applies to appellate court review of disqualification issues involving an appellate court judge, the four factors discussed in *Powell* may well have a direct bearing on the proper analysis of disqualification issues

confronted by trial court judges and judicial disciplinary entities. For that reason, the Board wishes to encourage careful consideration of the four *Powell* factors whenever disqualification issues under Rule 2.11(A) arise in relation to a lawyer appearing before the judge when the lawyer's firm represents the judge on other matters.

(7) *Judge 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 motion for a new trial because the judge who presided at Mr. Pratt'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.

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