

## Maryland Judicial Ethics Committee

**Opinion Request Number:** 2021-29

**Date of Issue:** January 12, 2022

Published Opinion    Unpublished Opinion    Unpublished Letter of Advice

### **Judge's Recusal Obligations related to former role in the State's Attorney's Office as Chief of the Circuit Court Division**

**Issue:** When must a judge who served as a prosecutor in the State's Attorney's office and was the chief of the circuit court division of that office for many years recuse himself or herself from a criminal case?

**Answer:** A judge is required to recuse from cases where the judge was personally or actively involved, has personal knowledge of disputed facts, or played a role in the determination of bringing criminal charges in the case, but a judge is not required to recuse from all criminal cases, unless there are circumstances that otherwise require the judge to recuse.

**Facts:** The Requestor is a judge of the circuit court and a former prosecutor, most recently chief of the circuit court division for the local State's Attorney's office. In that role, the Requestor supervised the investigation and prosecution of all homicide cases and some non-homicide cases, providing informal guidance and trial strategy assistance. The Requestor provided no assistance in felony drug investigations nor sexual offense cases. The Requestor has recused from presiding over homicide cases where the homicide occurred prior to his/her last day as a prosecutor but seeks further guidance from this Committee as to when a judge must recuse. The Requestor raises questions regarding whether other circumstances require recusal, including:

1. Cases where the crime or investigation occurred after the Requestor's last date of employment as chief of the circuit court division?
2. Criminal cases that have been transferred from the District Court via appeal or request for a jury trial, even if the crime occurred while the Requestor was chief of the circuit court division?
3. Criminal cases being prosecuted by an assistant State's attorney whom the Requestor supervised and to whom the Requestor provided informal or formal guidance, assistance, or trial-strategy help?

**Discussion:** Several Rules of the Maryland Code of Judicial Conduct are implicated in this request.

Rule 18-101.2 provides:

- (a) **Promoting Public Confidence.** A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary.

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- (b) **Avoiding Perception of Impropriety.** A judge shall avoid conduct that would create in reasonable minds a perception of impropriety.

Rule 18-102.2(a) provides: A judge shall uphold and apply the law and shall perform all duties of judicial office impartially and fairly.

Rule 18-102.7 provides: A judge shall hear and decide matters assigned to the judge unless recusal is appropriate.

Rule 18-102.11 provides, in pertinent part, as follows:

- (a) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including the following circumstances:

- (1) The judge has a personal bias or prejudice concerning a party or a party's attorney, or personal knowledge of facts that are in dispute in the proceeding.

\*                         \*                         \*

- (5) The judge:

- (A) served as an attorney in the matter in controversy, or was associated with an attorney who participated substantially as an attorney in the matter during such association;

- (B) served in governmental employment, and in such capacity participated personally and substantially as an attorney or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy.

- (c) A judge subject to disqualification under this Rule, other than for bias or prejudice under subsection (a)(1) of this Rule, may disclose on the record the basis of the judge's disqualification and may ask the parties and their attorneys to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and attorneys agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

Several jurisdictions have adopted a *per se* rule that requires judges who previously served as a chief prosecuting attorney to recuse from any criminal proceeding initiated by that office during the judge's term as chief prosecutor. See *Indiana Advisory Opinion 3-89*; *Michigan Advisory Opinion JI-34 (1990)*; and *Arizona Advisory Opinion 06-01*. In situations where the judge was not formerly the chief prosecuting attorney, however, other

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jurisdictions have rejected a blanket disqualification rule. *See Colorado Advisory Opinion 2019-04.*<sup>1</sup> We agree with the analysis set forth by the Colorado Supreme Court Judicial Ethics Advisory Board.

The Colorado Judicial Ethics Advisory Board explained that mere association with the State’s prosecutor’s office does not require that a judge be disqualified from presiding over every criminal matter. *Id.* at 1. If, however, the judge has personal knowledge of disputed facts, actively participated in,<sup>2</sup> or supervised the prosecutors in handling the specific criminal charges, or has had some role in the investigation, trial strategy, or prosecution of the case during the judge’s former employment, then recusal is necessary. *Id.* at 1-6; *accord California Formal Opinion 2015-007.*

This analysis comports with the ethics requirements in Maryland. The Court of Appeals has said that a trial judge performs a role that requires the public’s confidence in the system. “It is beyond dispute that . . . trial judges perform a unique and persuasive role in [the judicial] system: confidence in the judiciary is essential to the successful functioning of our democratic form of government.” *Jefferson-El v. State*, 330 Md. 99, 106 (1993) (quoting *Scott v. U.S.*, 559 A.2d 745, 748 (D.C. App. 1989)). A judge who has “personal knowledge of disputed evidentiary facts concerning the proceedings . . .” in this context means from extrajudicial sources such as former employment. *Boyd v. State*, 321 Md. 69, 75-80 (1990). Accordingly, we agree with the Requestor’s determination that he/she should recuse from any homicide case where the crime occurred, and the investigation

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<sup>1</sup> The opinion cites to *People v. Julien*, 47 P.3d 1194 (Colo. 2002), which states that a judge’s former employment with a government agency is insufficient grounds for disqualification unless the judge played an active part in a case, like supervising someone who prosecuted the case, or if the judge has personal knowledge of disputed facts.

<sup>2</sup> The California Supreme Court’s Committee on Judicial Ethics also issued an opinion noting active participation in a case as key to determining whether there is a concern for impartiality. *California Judicial Ethics Opinion 2015-007 citing Laird v. Tatum*, 409 U.S. 824, 828 (1972) [Supreme Court justice who was formerly a Justice Department official is disqualified if he either signs a pleading or brief or if he “actively participated” in any case even though he did not sign a pleading or brief]; *U.S. v. Ruzzano*, 247 F.3d 688, 695 (7th Cir. 2001) [some level of actual participation in the case by the judge while serving as an assistant United States attorney is required to trigger disqualification, on the basis that he or she participated as counsel, adviser, or material witness concerning the proceeding, or expressed an opinion concerning merits of case in controversy]. The California Ethics Committee stated that, to require disqualification in a case where there was not active participation in the prosecution, and no perception of impartiality, “would impede the administration of justice.” *Opinion No. 2015-007*, at 14. *But see New York Advisory Opinion 89-117* (noting that the determining factor for disqualification is whether a former county attorney now judge is listed as the attorney of record in a case regardless of whether the judge personally participated in the case or not).

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began, prior to the Requestor’s final day as chief of the circuit court division. The judge should also recuse from any other case, homicide or non-homicide violent felony, where the judge actively participated, including supervising the prosecutor with respect to that case. *See* Rule 18-102.11(a)(5) (a judge who served in governmental employment and participated personally or substantially in the proceeding shall disqualify from the proceeding).

Alternatively, pursuant to Rule 18-102.11(c), the Requestor may disclose the basis of the judge’s disqualification and ask the parties and their attorneys to consider whether to waive disqualification. If the parties and attorneys agree that the judge should not be disqualified, the Requestor may participate in the proceedings. *Id.*

With regard to homicides that occurred after the Requestor’s final day as chief of the circuit court division, and matters where the judge, when formerly serving as chief of the circuit court division, had no active participation or personal knowledge (such as matters transferred from the District Court), there is no mandatory recusal provision. Rule 18-102.11(a), however, requires that “[a] judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned . . . .” The judge, in these circumstances, must determine by exercising his or her discretionary authority whether recusal is appropriate. “The recusal decision . . . is discretionary . . . .” *Jefferson-El v. State*, 330 Md. at 107. Therefore, the judge, in making that determination and using a subjective analysis, must determine whether he or she is able to decide the case impartially. If the judge determines that he or she can be impartial, then he/she must engage in an objective analysis to determine whether his/her participation in such cases will “create in reasonable minds a perception of impropriety.” Rule 18-101.2(b). *See also*, Opinion 2021-11, discussing a judge’s recusal obligation in matters where a judge may have a personal conflict of interest. If the judge determines that there are no conflicts or any appearance of impropriety then he/she may preside over the matter.

The Requestor also asks about recusal based on the judge’s relationship with the prosecuting attorney who is a former co-worker or subordinate who may come before the judge on other criminal matters. As a practical matter, the administration of justice would be greatly affected if newly-appointed judges who were former division chiefs within the office of the State’s Attorney were disqualified from presiding over matters prosecuted by former subordinates. As the Colorado Judicial Ethics Advisory Board noted, the “mere existence of a relationship – whether personal or professional – is insufficient grounds for disqualification.” *See Colorado Advisory Opinion 2019-04* at 6 (*quoting Schupper v. People*, 157 P.3d. 517 (Colo. 2007)). However, there are several factors that a judge should consider when deciding whether it is appropriate to recuse based on a prior association or working relationship. The Arizona Supreme Court Judicial Ethics Advisory Committee opined on this issue and lists factors such as: 1) the size of the prosecutor’s office; 2) the duration and closeness of the association; and 3) how much time has elapsed since the judge worked in the prosecutor’s office. *See Arizona Advisory Opinion 06-01, citing Arizona Advisory Opinion 95-11*. The Colorado Supreme Court examined this issue and

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determined in *Julien* and *Schupper* that “the closeness of the relationship and its bearing on the underlying case determined whether disqualification [was] necessary.” See *Colorado Advisory Opinion 2019-04* at 6.

When determining whether there are grounds for recusal based on the personal or professional relationship of the judge and the former colleague or subordinate, the judge should perform the same analysis as described previously pursuant to Rule 18-102.11(a). The rule recognizes that the appearance of impropriety must be avoided and the judicial process must not only be fair but appear to be fair. *Jefferson-El*, 330 Md. at 107. If the judge has a very close relationship with the former associate,<sup>3</sup> the judge may need to recuse himself or herself if participation in the case would call into question the judge’s impartiality or give rise to the appearance of impropriety. See *D.C. Advisory Opinion 5 (1995)*; *D.C. Advisory Opinion 2 (1992)*. Disqualification in the situation where there is no appearance of impartiality interferes with the administration of justice and the requirements of Rule 18-102.7, which mandate that “[a] judge shall hear and decide matters assigned to the judge unless recusal is appropriate.” The judge also has the option to disclose the relationship and ask the parties and the attorneys if they consent to the judge proceeding with the case.

In conclusion, the Requestor is not required to recuse himself or herself from every criminal case because he/she was formerly a chief of the circuit court division. Recusal may be necessary where the judge actively participated in a case, supervised a former prosecutor with respect to that case, has personal knowledge as to disputed facts, has played some role in the pending charges now before the court, or if special circumstances exist that implicate bias. Even in those circumstances, recusal is not necessary if there is disclosure of the circumstances and the parties and their attorneys waive disqualification.

**Application:** The Maryland Judicial Ethics Committee cautions that this Opinion is applicable only prospectively and only to the conduct of the Requestor described herein, to the extent of the Requestor’s compliance with this opinion. Omission or misstatement of a material fact in the written request for opinion negates reliance on this Opinion. Additionally, this Opinion should not be considered to be binding indefinitely.

The passage of time may result in amendment to the applicable law and/or developments in the area of judicial ethics generally or in changes of facts that could affect the conclusion of the Committee. If the request for advice involves a continuing course of conduct, the Requestor should keep abreast of developments in the area of judicial ethics and, in the

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<sup>3</sup> In our prior Opinion 2021-11, we considered as a basis for recusal unique circumstances, which could lead a reasonable person to question the judge’s impartiality, such as a scenario where the judge and the former employee and spouse are close friends who vacation together. See also *Massachusetts Commission of Judicial Ethics, Opinion 2004-9*.

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event of a change in that area or a change in facts, submit an updated request to the Committee.