

Maryland Judicial Ethics Committee

Opinion Request Number: 2021-11

Date of Issue: June 07, 2021

Published Opinion Unpublished Opinion Unpublished Letter of Advice

Judge's Recusal Obligations

Issue: In the situation where a judge has an employee whose spouse is a senior partner in a firm in the county in which the judge serves, when the employee retires, is the judge required to recuse from cases where the employee's spouse, or members of spouse's law firm, are counsel for a party?

Answer: Once the judge's employee is retired and no longer working for the judge, the judge is not required to recuse from cases where the former employee's spouse, or members of the spouse's firm, are lawyers in the case unless there are circumstances that otherwise would require the judge to recuse.

Facts: The Requestor has recused from cases involving his/her employee's spouse and spouse's law firm during the time that the employee has worked for the Requestor. Given the employee's impending retirement, the Requestor asks the following questions regarding recusal:

1. After employee's retirement, will it ever be appropriate for me to begin to hear cases involving employee's spouse as counsel?
2. If appropriate, is there any recommended time before hearing such cases and should they only be cases filed after said retirement?
3. If there is a recommended time period, does it include any of the other attorneys in the firm?
4. If I am unable to hear cases involving former employee's spouse, does that recusal continue to include cases filed by other attorneys in the firm ?

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

Rule 18-101.2 provides that "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary" and "shall avoid conduct that would create in reasonable minds a perception of impropriety."

Rule 18-102.2 provides that "[a] judge shall uphold and apply the law and shall perform all duties of judicial office impartially and fairly."

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Rule 18-100.3 defines “impartial,” “impartiality,” and “impartially” as the “absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.”

Pursuant to Rule 18-102.3, “[a] judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.”

Pursuant to Rule 18-102.4 “[a] judge shall not permit family . . . or other interests or relationships to influence the judge’s judicial conduct or judgment.”

Rule 18-102.7 provides that “[a] judge shall hear and decide matters assigned to the judge unless recusal is appropriate.”

Rule 18-102.11(a) addresses the issue of recusal and requires, in pertinent part, that “[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 the party or a party’s attorney”

In determining whether the Requestor should recuse from a case where the former employee’s spouse, or a member of the spouse’s firm, is a lawyer for one of the parties, the Requestor must engage in both a subjective and an objective analysis. Initially, the Requestor must engage in a subjective analysis to determine whether he/she will be able to decide a case impartially in the situation where the spouse of his/her former employee, or a member of the spouse’s firm, is a lawyer for one of the parties. If the answer to that question is no, the judge should recuse from the case.

If the Requestor subjectively believes that he/she will be able to hear cases in these circumstances, he/she must then 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. Although a judge’s “duty to preside when qualified is as strong as [his or her] duty to refrain from presiding when not qualified,” the “appearance of impropriety ought to be avoided.” *Jefferson-el v. State*, 330 Md. 99, 107 (1993). The judicial process must “not only be fair, [it must] appear to be fair.” *Boyd v. State*, 321 Md. 69, 85–86 (1990). Generally, “a judge is required to recuse himself or herself from a proceeding when a reasonable person with knowledge and understanding of all the relevant facts would question the judge’s impartiality.” *Matter of Russell*, 464 Md. 390, 402 (2019).

In 2017, this Committee addressed a similar question relating to a judge’s ethical obligations in cases where a former employee appears as counsel for a party. We considered whether a judge was required to: (1) recuse in cases where the lawyer appearing before the judge was the judge’s former law clerk; or (2) disclose that prior employment relationship. Opinion 2017-21. We concluded that, “[a]bsent a personal bias in favor of,

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or against, a former law clerk, there is nothing in the mandatory recusal provisions of Rule 18-102.11(a) that directly or by implication impose an obligation on a judge to recuse simply because a former law clerk is acting as counsel to a party.” *Id.* at 6. If, however, there are “unusual circumstances,” and the judge determines that a reasonable person with knowledge of all the relevant facts would have a legitimate concern regarding the judge’s impartiality, the judge should recuse. *Id.* 8-9. In the situation where the judge believes, based on a subjective and objective analysis, that there is no basis for recusal, but the judge concludes that the parties or their attorneys might reasonably find the information regarding the prior employment relevant to a motion for disqualification, the judge may, in his/her discretion, disclose the prior employment relationship. *Id.* at 6, 10.¹

With regard to whether there were any “temporal restrictions on a judge’s ability to preside over cases in which former law clerks appear as counsel,” we noted that some states had enacted rules in that regard. *Id.* at 9. *See e.g.* New Jersey Revised Code of Conduct Rule 3.17(e) (Judge should not preside over a case in which a former clerk appears for six months after conclusion of employment.). We noted that Maryland had no analogous provision in the Rules, and therefore, the Committee did not conclude that there were temporal restrictions in the case of a former law clerk appearing as counsel.

With that background, we turn to the request at issue here. The decision whether to recuse ultimately is up to the Requestor. The Committee believes, however, that the analysis set forth in Opinion 2017-21, addressing the appearance of a former law clerk as a lawyer in a case, applies as well to other former employees. Absent unique circumstances requiring recusal, the Requestor is not required to recuse from cases where the spouse of a former employee, or another attorney in the firm, is counsel for one of the parties.²

The Requestor may, in his/her discretion, disclose the circumstances of the former employment relationship and the lawyers involved if the Requestor deems it advisable. If a party objects to the judge’s continued participation in the case after disclosure, the Requestor should exercise his/her discretion whether to recuse from the case.

¹ In our prior opinion, the Committee recognized that disclosure might invite a motion for the judge to recuse. Opinion 2017-21, at 8. We concluded that “[a] judge who discloses a matter that is not a legitimate basis for recusal and is then confronted by a motion to recuse after disclosure is not required to grant such a motion.” *Id.*

² Unique circumstances may include, for example, if the judge and the former employee and spouse are close friends who vacation together, which could lead a reasonable person to question the judge’s impartiality. *See Massachusetts Commission of Judicial Ethics, Opinion 2004-9.* Additionally, if the former employee’s spouse, or another member of the spouse’s firm, appears as counsel in a case filed prior to the employee’s retirement, the court should assess the employee’s involvement in the case, if any, and determine whether, under all of the circumstances, a reasonable person would question the judge’s impartiality.

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