Maryland Judicial Ethics Committee

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■ Published Opinion □ Unpublished Opinion □ Unpublished Letter of Advice

A Judge's Disclosure Obligations Regarding Former Law Clerks

Issue: Is a judge required to disclose the fact that a lawyer appearing before the judge is his/her former law clerk?

Answer: Absent a relationship between the judge and the former law clerk that would otherwise require the judge to recuse, a judge is not required to disclose the fact that a lawyer in a case over which the judge is presiding is a former law clerk.

Facts: Requestor is a circuit court judge who poses the following inquiry, which we have re-worded slightly:

> I am requesting an opinion as to whether the fact that an attorney representing a party before me had once been my law clerk is a matter that must be disclosed so as to avoid the appearance of impropriety.

Discussion

1. The Role of Law Clerks

At the present time, judges at all levels of the Maryland court system utilize law clerks as research assistants.[1] Law clerks are typically recent law school graduates with very limited practical legal experience. The term of employment is usually limited to one year, although some judges hire clerks for two year terms. (Some appellate judges in Maryland employ "senior clerks." Senior clerks are permanent employees.) Appellate and circuit court judges make their own decisions as to hiring law clerks. Law clerks for the judges of the District Court of Maryland are hired by administrative judges.

The role of law clerks is not always understood by non-judges. Although written more than 25 years ago in the context of a federal trial court, the following is an apt description of the current roles of most law clerks in Maryland's courts:

> [T]he explosion of legal authority and sheer volume of paperwork attendant to modern practice now focus a law clerk's function on [the] ability to act as

[1] Judges on the Court of Appeals and Court of Special Appeals employ two or three law clerks. Circuit court judges employ one each. Clerks for the District Court work for panels of judges.

> a sieve for the flow of information by distilling reams of briefing and documentation into those facts which are relevant and by extracting those legal authorities which are germane to the issues presented. . . . [A] law clerk [also] assists the Court in defining issues and locating authorities which have eluded counsel. If the law clerk is fortunate and the judge wise, the clerk will also be utilized as a sounding board and devil's advocate in the decision-making process.
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> . . .
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> Fresh out of law school, [law clerks] . . . rotate in and out and a new face . . . appear[s] annually.

Bishop v. Albertson's, Inc., 806 F. Supp. 897, 900 (E.D. Wash. 1992) (citations and footnote omitted). [2]

2. Summary

As we will explain, the concepts of disclosure and recusal are inextricably linked. Under some circumstances, a judge who is otherwise required to recuse may ask the parties to consent to his/her continued participation. Whether a judge is required to recuse depends upon whether the judge's continued participation in the action would undermine public confidence in the judiciary. Therefore, answering the Requestor's inquiry requires the Committee to consider the interaction of three provisions of the Maryland Code of Judicial Conduct (the "Code"), as well as some of their accompanying Comments. The first is Md. Rule 18-101.2, which requires a judge to "avoid conduct that would create in reasonable minds a perception of impropriety." The second is Rule 18-202.7, which requires a judge to decide a case unless recusal is appropriate. The third is Rule 18-102.11, which sets out circumstances which require a judge to recuse but also allows parties a right to waive recusal under some circumstances after disclosure by the judge.

Read together in the context of appropriate interpretive sources, these rules require a judge to recuse him/herself because a former law clerk is acting as counsel if: (1) the judge is unable to preside over the case without bias or prejudice, or

[2] The notion of hiring recent law school graduates to assist judges in the performance of their duties originated in the middle of the 19th Century with Horace Gray, who was at the time a member of the Massachusetts Supreme Judicial Court. Justice Gray continued to hire law clerks (at his own expense) after his appointment to the United States Supreme Court in 1875. *See Bear v. Potter*, 89 F. Supp. 2d 687, 691 (W.D.N.C. 1999).

(2) the judge believes that there is a substantial possibility that a reasonable person would have doubts as to the judge's ability to do so. In this context, "reasonable person" does not mean a person on the street but rather an individual who is familiar with the facts and applicable legal principles. Recusal under either of these scenarios is mandatory. A Comment to Rule 18-102.11 invites judges to disclose matters to parties and counsel even if the judge does not believe that there is a basis for the judge to recuse. The Comment is aspirational and a judge must exercise his/her discretion in deciding whether to do so.

3. Avoiding the Appearance of Impropriety

Rule 18-101.2 states (emphasis added):

> Promoting Confidence in the Judiciary
> (a) A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary.
> (b) A judge shall avoid conduct that would create in reasonable minds a **perception of impropriety**.

"Impartiality" is a defined concept in the Code. Rule 18-100.3 (d) states (emphasis added):

> (d) Impartial. "Impartial," "impartiality," and "impartially" mean **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.

Comment [5] to Rule 18-101.2 explains what the term "appearance of impropriety" means (emphasis added):

> [5] Actual improprieties include violations of law, Court Rules, and this Code. **The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception** that the judge's ability to carry out judicial responsibilities with competence, **impartiality**, and integrity **is** impaired.

The Code does not define the concepts of "reasonable" or a "reasonable mind." However, the Code does state that "[t]he Rules in this Code are rules of reason that should be applied in a manner that is consistent with . . . decisional law[.]" Rule 18-100.1((b)(3).

There is directly relevant decisional law. In *Boyd v. State*, 321 Md. 69 (1990), the Court of Appeals explained the meaning of "reasonable" in the context of whether a judge should recuse him/herself to avoid the appearance of impropriety:

> "[T]he test to be applied is an objective one which assumes that a reasonable person knows and understands all the relevant facts. . . . Like all legal issues, judges determine appearance of impropriety—**not by considering what a straw poll of the only partly informed man-in-the-street would show—but by examining the record facts and the law**, and then deciding whether a reasonable person knowing and understanding **all** the relevant facts would recuse the judge."

Id. at 86 (citations omitted) (emphasis in original) (quoting *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2d Cir. 1988)); *see also Bishop v. State*, 218 Md. App. 472, 492–94 (2014) (applying the same standard).

4. The Judge's Duty to Decide

Rule 18-102.7 states:

> Responsibility to Decide
> A judge shall hear and decide matters assigned to the judge unless recusal is appropriate.

Comment [1] to Rule 18-102.7 states in pertinent part:

> Although there are times when disqualification is necessary or appropriate 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.

Decisional law is also pertinent in this context. As the Court noted in *In re Turney*, 311 Md. 246, 253 (1987), "a judge's duty to sit where not disqualified is equally as strong as the duty not to sit where disqualified."

5. Recusal and Disclosure

Rule 18-102.11 states in pertinent part (emphasis added):

> Disqualification[3]

[3] For the purposes of Rule 18-102.11, "disqualification" and "recusal" mean the same thing. *See* Rule 18-102.11 Comment [1].

(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.

(2) The judge knows that the judge, the judge's spouse or domestic partner, an individual within the third degree of relationship to either of them, or the spouse or domestic partner of such an individual:

(A) **is a party to the proceeding**, or an officer, director, general partner, managing member, or trustee of a party;

(B) **is acting as an attorney in the proceeding**;

(C) is an individual who has more than a de minimis interest that could be substantially affected by the proceeding; or

D) is likely to be a material witness in the proceeding.

(3) The judge knows that he or she, individually or as a fiduciary, or any of the following individuals has a **significant financial interest** in the subject matter in controversy or in a party to the proceeding:

(A) the judge's spouse or domestic partner;

(B) an individual within the third degree of relationship to the judge; or

(C) any other member of the judge's family residing in the judge's household.

. . .

(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) **previously presided as a judge** over the matter in another court; or

. . .

> (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.

The list of scenarios set out in subsection (a)(1) through (5) is not intended to be exclusive but rather is illustrative of the kinds of relationships that require recusal. *See* Comment [1] to Rule 18-102.11. The possible significance of a former employer/employee relationship between a judge and a law clerk is not remotely the equivalent of, for example, a judge's presiding over an action when the judge him/herself is a party, or when the judge's spouse is trial counsel for a party, or when the judge has a direct or indirect financial interest in the outcome of the case. Absent a personal bias in favor of, 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 imposes an obligation on a judge to recuse simply because a former law clerk is acting as counsel to a party. However, two Comments to Rule 18-102.11 can be read to imply just such an obligation.

6. Comments [4] and [5] to Rule 18-102.11

The relevant Comments are (emphasis added):

> [4] A judge **should** disclose on the record information that the judge believes **the parties or their attorneys might reasonably consider relevant** to a possible motion for disqualification, **even if the judge believes there is no basis for disqualification**.
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> [5] **This procedure gives the parties an opportunity to waive the recusal if the judge agrees.** The judge may comment on possible waiver but must ensure that consideration of the question of waiver is made independently of the judge. A party may act through an attorney if the attorney represents on the record that the party has been consulted and consents. As

> a practical matter, a judge may request that all parties and their attorneys sign a waiver agreement.

In order to assess the significance of these two Comments, we must first place them in context. There are two relevant limitations that appear elsewhere in the Code.

The first is that "[a] judge can be disciplined only for violating a Rule." Rule 18-100.1(b)(1). For this reason, Comments "neither add to nor subtract from the binding obligations set forth in the Rules." Rule 18-100.1(b)(2)(B). Instead, Comments generally serve two functions. Comments may "contain explanatory material, and, in some instances, provide examples of permitted or prohibited conduct." Rule 18-100.1(b)(2)(A). Additionally, Comments "may identify aspirational goals for judges. To implement fully the principles of this Code, judges should hold themselves to the highest ethical standards and seek to achieve those aspirational goals[.]" Rule 18-100.1(b)(2)(C).

The second limitation is that "should" has a very specific meaning in the Code (emphasis added):

> If a Rule contains a permissive term, such as "may" or "should," **the conduct being addressed is committed to the personal and professional discretion of the judge** or candidate in question, and no disciplinary action should be taken for action or inaction within the bounds of that discretion.

Rule 18-100.1(b)(1).

We see no reason to ascribe a different meaning to "should" when it appears in a Comment. Therefore, we conclude that Comment [4] is aspirational. For this reason, Rule 18-102.11 does not impose an unvarying duty on a judge to "disclose on the record information that the judge believes the parties or their attorneys might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification." Whether to disclose under such circumstances lies within the bounds of the judge's discretion.

In deciding how to exercise that discretion, a judge's primary concern should be whether disclosure will promote public confidence in the judiciary. A judge may

give weight to the fact that, absent an unusual circumstance, the relationship between a judge and a former law clerk is not a basis for mandatory recusal.[4] A judge should decide what "the parties or their attorneys might reasonably consider relevant" according to the objective standard described in *Boyd v. State*, which we discussed earlier in this opinion. The judge may also bear in mind the difference between lawyers and litigants. Most lawyers understand that judges can decide matters without bias as to lawyers with whom the judge has been associated, whether as a law clerk or in the practice of law. Litigants may not have the same confidence. For a non-lawyer who is engaging in his or her first trial experience everything may be unfamiliar and even frightening. A litigant's concerns might be allayed when a judge discloses on the record that the lawyer before him or her is a former law clerk and further explains that judges routinely decide cases in which one or both lawyers had a prior professional relationship with the judge.

The two Comments present a problem that the Committee recognizes but cannot resolve. As Comment [5] suggests, disclosure by a judge will often invite a motion for the judge to recuse. Parties can be motivated to ask for recusal for a variety of reasons, some which are proper, and others which are entirely improper, such as judge shopping or seeking an otherwise unwarranted postponement. 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. The judge's responsibility to decide is not trumped by objectively unreasonable, even if sincerely-held, concerns. Granting a meritless motion to recuse does not promote public confidence in the judiciary; indeed, it can be fairly said to detract from it.

7. How Other Jurisdictions Address Former Law Clerks and Recusal

Against this background, it is not surprising that the advice given by judicial ethics committees in other jurisdictions is not uniform. *Compare* Delaware Judicial Ethics Advisory Committee JEAC 2009-1 ("Absent some personal relationship between a Judge and the former clerk which could call into question the Judge's

[4] Examples of "unusual circumstances" in this context might be: whether the judge and the former law clerk socialize and are guests in one or the other's home on a regular basis; whether the judge officiated at the former law clerk's wedding; and whether the judge has recently acted as a reference for the former law clerk for employment purposes.

impartiality . . . the Committee does not find any prohibition against" a judge presiding over a proceeding involving a former law clerk.); Massachusetts Committee on Judicial Ethics Opinion No. 2002-9 (A judge who is also an adjunct law professor is not required to recuse when a former student appears as counsel.), *with* District of Columbia Advisory Committee on Judicial Conduct Advisory Opinion No. 13 (2014) ("[A]s a general rule of thumb, law clerks should not appear before the judges for whom they clerked within a year after the end of the clerkship.").

Some states have addressed the law clerk issue by enacting rules or policies that impose temporal restrictions upon a judge's ability to preside over cases in which former law clerks appear as counsel. *See* New Jersey Revised Code of Judicial Conduct Rule 3.17(e) (Judge should not preside over an action in which a former clerk appears for six months following termination of clerkship.); Delaware Conflict of Interest Policies for Law Clerks (same).[5] There is no analogous provision in the Maryland Code of Judicial Conduct.

8. Recapitulation

(1) If a judge believes that he/she will be unable to decide a case impartially because a former law clerk is appearing for one of the parties, the proper action for the judge is to recuse. Disclosure in such a case is not a remedy for the judge's inability to decide impartially. Although the judge may explain the reasons for his/her decision, parties cannot consent to the judge's presiding and should not be asked to consider doing so. *See* Md. Rule 18-211(c).

(2) If the judge subjectively believes that he/she will be able to decide the case impartially even though a former law clerk is appearing for one of the parties, but the judge also recognizes that "a reasonable person knowing and understanding all the relevant facts" would have legitimate concerns about the judge's ability to decide the case impartially, the judge should recuse. Failing to do so would undermine public confidence in the judiciary by acting in a way that a reasonable person would deem improper. *See* Rule 18-101.2. The judge should assess what a reasonable person would consider problematic according to the objective standard set out in *Boyd v. State*. Again, the judge may explain the reasons for his/her decision, but the parties should not be asked to consent to the judge's continuing to preside.

[5] The Delaware policy is available at:
www.deb.uscourts.gov/sites/default/files/.../ConflictofIinterestPolicy%5B1%5D_0.pdf.
(last visited August 28, 2017).

(3) When the judge subjectively believes that he or she is able to preside over the matter without bias or prejudice and the judge is confident that "a reasonable person knowing and understanding all the relevant facts" would agree with the judge's assessment, the Code does not require the judge to recuse nor is the judge required to disclose the former law clerk relationship. Instead, disclosure under such circumstances is a matter of the judge's discretion. The judge should look to *Boyd* and similar cases for guidance as to what a "reasonable person" might or might not consider problematic but, as we have previously discussed, other concerns may also be legitimate factors for the judge's consideration.

Application: The 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.