

Maryland Judicial Ethics Committee

Opinion Request Number: 2019-22

Date of Issue: August 7, 2019

Published Opinion Unpublished Opinion Unpublished Letter of Advice

A Judge need not automatically recuse him/herself from a defendant's criminal trial merely because the judge presided over a prior protective order or peace order petition involving the defendant

Issue: Is a judge automatically required to recuse from a criminal trial **merely** because the judge presided over a prior peace order or protective order involving the defendant?

Answer: No.

Facts: The Requestor is a District Court judge who was assigned to preside over a criminal trial regarding charges of assault. Less than two months prior to the scheduled trial date, the judge presided over a final protective order hearing that involved the defendant. The Requestor notes that, in his/her jurisdiction, protective order and peace order petitions are docketed daily, and the conduct involved can generate criminal charges as well. When the criminal cases come to trial, typically two to three months later, it is not unusual for them to come before the same judge who heard the earlier protective/peace order petition.

In this case, one of the parties filed a motion to recuse the judge in the criminal case, asserting that the protective order hearing was contentious. The judge requests advice whether he/she, or any other judge, can hear a criminal case after the judge has granted or denied a protective order or peace order between the State's witness and the criminal defendant.

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.

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

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

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And specifically addressing recusal, Rule 18-102.11(a) 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 party’s attorney, or personal knowledge of facts that are in dispute in the proceeding.

* * *

The Court of Appeals has stated that the term “personal” in the context of this Rule means “knowledge acquired from extrajudicial sources,” and that “information acquired during prior judicial proceedings [is not] personal knowledge or bias requiring disqualification. *Boyd v. State*, 321 Md. 69, 76 (1990). *Accord United States v. Monaco*, 852 F.2d 1143, 1147 (9th Cir. 1988) (“parties cannot attack a judge’s impartiality on the basis of information and beliefs acquired while acting in his or her judicial capacity.”), *cert. denied*, 488 U.S. 1040 (1989). Thus, while recusal is required where a prior proceeding has resulted in the judge’s personal bias or prejudice against a party, a judge is not automatically required to recuse from a criminal trial merely because he/she presided over a related prior protective/peace order hearing.

The ethics rule, however, “recognizes that the appearance of impropriety ought to be avoided as well,” and the judicial process must not only be fair but appear to be fair. *Jefferson-el v. State*, 330 Md. 99, 107 (1993). The comments to Rule 18-102.11 include the following: “Under this Rule, a judge is disqualified whenever the judge’s impartiality might reasonably be questioned, regardless of whether any of the specific provisions of subsections (a)(1) through (5) apply.” The term “disqualification” has the same meaning as “recusal.”

The determination whether a judge should recuse from a criminal trial when the judge previously presided over a prior protective/peace order proceeding involving the defendant, based on the appearance of impropriety, will depend on the particulars of the trial. For example, a judge’s statements in the initial proceeding could create “a situation in which it would appear that he could not, with impartiality, preside at any subsequent criminal trial.” *Jefferson-El*, 330 Md. at 110.

In sum, a judge is not automatically required to recuse from a criminal case after the judge has granted or denied a protective order or peace order between the State’s witness and the criminal defendant. The judge should, however, particularly in a case where there is

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a motion to recuse, assess whether, based on the facts and circumstances of the initial case, there is an appearance of impropriety in presiding over the criminal case.¹ If that is the situation, the judge should recuse and have the criminal case assigned to a different judge.

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.

¹ A motion is not required for a judge to recuse, however. As Comment [2] to Rule 18-102.11 states: “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.”