National Judicial College

STUDY MATERIALS 2010

DISQUALIFICATION

I. Introduction

A judge who is neutral and appears to be neutral is a necessary element of justice and a requisite for public confidence in the judiciary. Therefore, Canon 3C(1) of the 1972 American Bar Association Model Code of Judicial Conduct creates a general requirement for disqualification whenever a judge's "impartiality might reasonably be questioned . . . ."

Under Canon 3C(1), a judge should make a two-part inquiry. The first test is a subjective "internal test of freedom from disabling prejudice," in which a judge consults his or her emotions and conscience. *Lena v. Commonwealth*, 340 N.E.2d 884 (Mass. 1976). The second test is objective: whether an objective, disinterested person knowing all the circumstances would reasonably question the judge's impartiality, even where there was no actual impropriety but only an appearance of impropriety. *See, e.g., Pepsico, Inc. v. McMillen*, 764 F.2d 458 (7th Cir. 1985).

In addition to the general standard, Canon 3C(1) enumerates specific circumstances that require disqualification. As discussed below, those specific circumstances are: (1) personal bias or prejudice, (2) personal knowledge, (3) former professional relationships with someone involved in the case, (4) family relationships with someone involved in the case, and (5) financial or economic interests involved in the case. The material also covers when and how disqualification can be waived.

II. Personal bias or knowledge

Under Canon 3C(1)(a), disqualification is required if a judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . ."

A. Personal bias and prejudice

But in certain cases a doctrine is universal

To be disqualifying, bias or prejudice must be concerning a *party*; a judge's values, philosophy, or "fixed beliefs about constitutional principles and many other facets of the law" are not considered personal biases or prejudices that require disqualification. E.W. Thode, *Reporter's Notes to Code of Judicial Conduct* at 61 (1973). In addition, to be disqualifying, bias or prejudice must be *personal*, that is, arising from an extra-judicial source and resulting in an opinion on the merits based on something other than what the judge has learned from participating in the case. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966).

United States v. Barry, 961 F.2d 260 (D.C. Cir. 1992)

The United States Court of Appeals for the District of Columbia Circuit held that the trial judge was not disqualified from re-sentencing the defendant on the basis of the judge's discus-

sion of the merits of the case while it was pending on appeal after the first sentencing. In a public speech at Harvard Law School after sentencing the defendant the first time, the judge had remarked that he had never seen a stronger government case, that some jurors had their own agendas and would not convict under any circumstances, that some jurors were determined to acquit regardless of the facts, and that some jurors did not tell the truth during jury selection when questioned about possible bias. The court held that remarks reflecting even strong views about a defendant will not call for a judge's recusal so long as those views are based on the judge's own observations during the performance of judicial duties.

1. Judge as "adversary" of a party. Generally, disqualification is not required by a collateral lawsuit between a judge and a party because permitting wholesale disqualification in that situation would allow litigants to choose their judge by filing lawsuits against all judges not to their liking. *See, e.g., Commonwealth v. Leventhal*, 307 N.E.2d 839 (Mass. 1974). Disqualification may be required where the suit involving the judge personally was filed before the suit in which the judge is presiding was filed. *People v. Lowenstein*, 325 N.W.2d 462 (Mich. 1982.)

2. Social relationship. Whether a judge is required to disqualify when a friend appears as a party or attorney in a suit depends on how close and how personal the relationship is. The two-part test is whether the judge feels capable of disregarding the relationship and whether others can reasonably be expected to believe that the judge will disregard the relationship. *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986). The judge must consider whether an astute observer in either the legal or lay culture "would conclude that the relation between judge and lawyer (a) is very much out of the ordinary course, and (b) presents a potential for actual impropriety if the worst implications are realized." *Id.* In *Murphy*, finding the trial judge should have disqualified himself, the Court of Appeals for the 7th Circuit held that:

> an objective observer reasonably would doubt the ability of a judge to act with utter disinterest and aloofness when he was such a close friend of the prosecutor that the families of both were just about to take a joint vacation. A social relation of this sort implies extensive personal contacts between judge and prosecutor, perhaps a special willingness of the judge to accept and rely on the prosecutor's representations.

3. Animosity toward a party's attorney. Under the 1972 Model Code, prejudice against an attorney is not sufficient to disqualify a judge unless the bias "is of such a degree as to adversely affect the interest of the client . . . ." *Martinez v. Carmona*, 624 P.2d 54 (N.M. Ct. App. 1980). Canon 3E(1)(a) of the 1990 Model Code added personal bias or prejudice concerning a party's lawyer to the list of disqualifying circumstances after the drafting committee became "aware of instances in which individual judges had demonstrated a profound prejudice against certain lawyers, and found that prejudice to be sufficiently detrimental to the judge's appearance of impartiality as to be grounds for disqualification." Lisa L. Milord, *The Development of the ABA Judicial Code* at 27 (1992).

4. Participant in judge's election campaign. A judge may sit on a case in which a campaign contributor is a party or attorney or otherwise involved. *See, e.g., Nathanson v. Korvick*, 577 So. 2d 943 (Fla. 1991). However, "campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may be relevant to disqualification under Section 3E." Commentary to Canon 5C(2), 1990 Model Code. Moreover, a judge is disqualified from a case if a party or attorney was more than simply a contributor, for example, if the attorney was a member of the judge's campaign committee. *See, e.g., MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So. 2d 1332 (Fla. 1990).

B. Personal knowledge

As with allegations of personal bias and prejudice, the personal knowledge requiring recusal is knowledge from extra-judicial sources as opposed to what a judge learns from participating in a case. A judge does not have "personal knowledge" about a case as a result of (1) ruling on issues earlier in the same case, (2) adjudicating the case of related parties to the same underlying transaction as the pending case, or (3) participating in an earlier trial of the same party whether or not based on the same transaction as the pending charge. *See Jones v. State*, 416 N.E.2d 880 (Ind. Ct. App. 1981).

But longevity of water cases ?

III. Professional relationships

Under Canon 3C(1)(b), a judge is disqualified if the judge "served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it . . . ."

A. Prior service as a lawyer in the matter

Active participation in the same case as counsel of record or representation at an earlier stage in the proceedings may require disqualification. Note that a chief prosecutor may be considered "of counsel" in all cases or matters pending in his or her jurisdiction, from the investigation stage to and including the appeal of the case. *King v. State*, 271 S.E.2d 630 (Ga. 1980).

Disqualification also may be required if the judge's representation of a party was many years earlier but involved a related or similar matter concerned the same subject or arose from the same facts.

Sharp v. Howard County, 607 A.2d 545 (Md. Ct. App. 1992)

Ordering that the circuit court judgment be vacated, the Court of Appeals of Maryland held that the circuit court judge should have recused himself from a zoning case involving a private airstrip where, seventeen years earlier, the judge while an attorney had drafted the restrictive covenants creating the airstrip. The court stated that, when an attorney has given legal advice or performed legal work in a non-adversarial setting, recusal is required if the underlying purpose of the prior representation was to achieve the goal that is at issue in a later proceeding before the same attorney as judge.

B. Prior association with a lawyer serving in the matter

Under Canon 3C(1)(b), when the judge's former law firm or a lawyer with whom the judge had a professional relationship appears before the judge, the judge is disqualified if the lawyer represented the party on the same matter now before the judge while the judge was associated with that lawyer, even if the judge had not been involved.

Where a judge was previously employed by a government agency and lawyers currently employed by that agency appear before the judge, the judge is not automatically disqualified. A "lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency," but "a judge formerly employed by a governmental agency . . . should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association." Commentary to Canon 3C(1)(b), 1972 Model Code.

Disqualification is not automatically required under Canon 3C(1)(b) when the matter before the judge in which a member of the judge's former firm appears was not handled by the firm while the judge was associated with it. However, to avoid the appearance of partiality, some states require judges to routinely disqualify themselves for a specified length of time from hearing any matters involving their former law office even if the particular matter was not pending before the judge left the firm. *See, e.g.*, Illinois Supreme Court Rule 63(C)(1)(c) (requiring recusal for three years).

IV. Family relationships

Canon 3C(1)(d) suggests judicial disqualification when the judge, the judge's spouse, or a person "within the third degree of relationship to either of them, or the spouse of such a person (i) is a party to the proceeding, or an officer, director, or trustee of a party; (ii) is acting as a lawyer in the proceeding; (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or (iv) is to the judge's knowledge likely to be a material witness in the proceeding."

Parents, grandparents, grandchildren, uncles, aunts, brothers, sisters, nieces, nephews, sons, and daughters are within the third degree of relationship. Commentary to Canon 3C(3)(a), 1972 Model Code.

V. Financial, economic, or other interests

Canon 3C(1)(c) requires disqualification in two circumstances. First, recusal is necessary where a judge or relative within the third degree has a financial interest either in the subject matter in controversy or in a party to the proceeding, regardless whether the outcome of the proceeding would have any effect on the interest. Second, disqualification is required where the judge or relative within the third degree has any other interest that could be substantially affected by the outcome of the proceeding.

To be disqualifying, a judge's financial interest must be direct, real, and certain, not conditional or remote. *Nueces County Drainage & Conservation District No. 2 v. Bevly*, 519 S.W.2d 938 (Tex. Ct. App. 1975). However, disqualification may be required for less direct, real, and certain interests under the "any other interest" clause of Canon 3C(1)(c).

> *In re: Zoarski*, Memorandum of Decision (Connecticut Judicial Review Council April 17, 1991)
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> The Connecticut Judicial Review Council publicly censured a superior court judge who had failed to disqualify himself in a case that involved a request to subdivide a residential piece of property into two lots where the town involved in the case had an "existing streets" regulation that was very similar to the existing streets regulation that the judge was challenging in another town in connection with a request to subdivide a piece of property he and his wife owned.

The 1972 Model Code defines "*financial* interest" as "ownership of a legal or equitable interest, *however small* . . . ." Canon 3C(3)(c) (emphasis added). One of the changes made to the Model Code in 1990 was to use the term "*economic* interest" instead of "financial interest" and to delete the reference to "any other interest" because economic interest was considered "more inclusive" than "financial interest." Lisa L. Milord, *The Development of the ABA Judicial Code* at 10 (1992).

Furthermore, under the 1990 Model Code, not every economic interest "however small" is disqualifying, but only an economic interest that is "more than de minimus." The ABA believed that "a judge's merely having a de minimus legal or equitable interest in a proceeding does not give rise to reasonable question as to the judge's impartiality." *Id.*

A judge has a responsibility to inform himself or herself about any personal and fiduciary financial interests and to make a reasonable effort to be informed about the personal financial interests of the judge's spouse and minor children residing in the judge's household. Canon 3C(2). A judge does not have the same responsibility to inform himself or herself about any interests of relatives other than his or her spouse and minor children but is disqualified only if the judge knows that the relative has an interest that could be substantially affected by the outcome of the case.

Several cases hold that, if counsel is affiliated with a law firm in which one of the partners is a relative of the judge or the judge's spouse within the third degree or such a relative's spouse, the relative has an interest that "could be substantially affected by the outcome of the proceeding," and the judge is disqualified even if the relative is not involved in the case. *See Potashnick v. Port City Construction Co.*, 609 F.2d 1101 (5th Cir. 1980); *Regional Sales Agency, Inc. v. Reichert*, 830 P.2d 252 (Utah 1992). Note, however, that commentary in both the 1972 and the 1990 model codes states that a lawyer's affiliation with a law firm with which a relative of the judge is also affiliated does not of itself disqualify the judge.

VI. Waiver of disqualification

Under Canon 3C of the 1972 Model Code, the parties *cannot* waive disqualification arising because the judge has a personal bias concerning a party or personal knowledge concerning the evidence (under Canon 3C(1)(a)), or because the judge served as a lawyer in the matter or a lawyer with whom the judge previously practiced law served as a lawyer in the matter during the association, or because the judge or former associate has been a material witness (under Canon 3C(1)(b)). Under the 1972 Model Code, the parties can waive disqualification arising from a financial interest (under Canon 3C(1)(c)) or from family involvement in the proceedings (under Canon 3C(1)(d)).

Under the 1990 Model Code, the parties *can* waive disqualification based on prior service as a lawyer, prior association with a lawyer appearing in the matter, or an economic interest. The only grounds that cannot be waived under the 1990 Model Code are personal bias or prejudice. Canon 3F, 1990 Model Code.

In circumstances where disqualification can be waived, under the 1972 Model Code, the judge can preside only if he or she first discloses the basis for the disqualification on the record to the attorneys and parties. Canon 3D requires all parties and attorneys to agree in writing that the financial interest or family involvement is immaterial; and the judge cannot ask for a waiver or in any other way participate in the waiver after disclosure. However, some cases have held that disqualification can be waived by implication without a written agreement if, after disclosure by the judge, none of the parties object to the judge presiding. *See, e.g., Citizens First National Bank v. Hoyt*, 297 N.W.2d 329 (Iowa 1980).

The 1990 Model Code eases the requirements for waiver. Under the 1990 Model Code, a judge may ask the parties to consider waiving disqualification, although their consideration of that request must be "out of the presence of the judge." A judge "must not solicit, seek or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation . . . ." Canon 3F and Commentary to Canon 3F, 1990 Model Code. In addition, under the 1990 Model Code, the waiver of disqualification need not be in writing, although it must be on

the record. The Commentary states that "[a]s a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement. Commentary to Canon 3F, 1990 Model Code.

VII. The rule of necessity

Where there is no other court to hear a case, the rule of necessity provides that a court may preside even if the members of the court have a disqualifying financial interest. For example, because it was the only court authorized to hear the case, the Supreme Court of Oregon recently heard challenges to the state Public Employees' Retirement System, even though as members of the system, each justice had a financial interest in the outcome. *Hughes v. Oregon*, 838 P.2d 1018 (Ore. 1992). *See also United States v. Will*, 449 U.S. 200 (1980).

Olsen v. Lorig

O'Connor in Big Horn